Supreme Court, U.S.
FILED

971569 MAR 23 1998

OFFICE OF THE CLERK

No. 97-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

ROBERT MAURICE BLOOM, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Deputy Attorney General
ROBERT M. SCHNEIDER
Deputy Attorney General
DONALD E. DE NICOLA *
Deputy Attorney General
* Counsel of Record
300 South Spring St.
Los Angeles, California 90013
Telephone: (213) 897-2388
Counsel for Petitioner

108 pp

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the existence of a purported Sixth Amendment rule, imposing a duty upon criminal defense counsel to identify and provide a defense expert with information the expert might find relevant in rendering a non-legal opinion, was so settled that it became permissible under the *Teague v. Lane* doctrine for the Ninth Circuit to enforce the rule retroactively to grant habeas corpus relief to a state prisoner.

2. Whether the "prejudice" necessary to a Sixth Amendment claim of ineffective counsel under *Strickland v. Washington* requires, beyond a showing of probable effect on the actual outcome of the trial, a determination that counsel's deficient performance rendered the trial fundamentally unfair or unreliable.

TABLE OF CONTENTS

	Page
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION	2
STATUTORY PROVISION	2
STATEMENT OF THE CASE	2
REASONS THE WRIT SHOULD BE GRANTED	7
Question 1	7
Question 2	12
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
Ake v. Oklahoma, 470 U.S. 68 (1985)	20
Allen v. United States, 164 U.S. 492 (1896)	9
Battle v. Delo, 19 F.3d 1547 (8th Cir. 1994)	14
Beam v. Paskett, 3 F.3d 1303 (9th Cir. 1993)	10
Beam v. Paskett, 966 F.2d 1563 (9th Cir. 1992)	10
Blazak v. Ricketts, 1 F.3d 891 (9th Cir. 1993)	10
Bloom v. Vasquez, 840 F.Supp. 1362 (C.D. Cal. 1993)	8, 18
Butler v. McKellar, 494 U.S. 407 (1990)	8
Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990)	7
Caspari v. Bohlen, 510 U.S. 383 (1994)	8

TABLE OF AUTHORITIES, CONT'D

Clisby v. Jones,
907 F.2d 1047 (11th Cir. 1990), 20

Coe v. Thurman,
922 F.2d 528 (9th Cir. 1990) 10

Eddings v. Oklahoma,
455 U.S. 104 (1982) 10

Estelle v. McGuire,
502 U.S. 62 (1991) 18

Fetterly v. Paskett,
15 F.3d 1472 (9th Cir. 1994) 9

Gallego v. McDaniel,
124 F.3d 1065 (9th Cir. 1997) 9

Goeke v. Branch,
514 U.S. 115 (1995) 8

Goodwin v. Johnson,
132 F.3d 162 (5th Cir. 1998) 16, 17, 19

Graham v. Collins,
506 U.S. 475 (1994) 8, 11

Gretzler v. Stewart,
112 F.3d 992 (9th Cir. 1997) 10

Harmon v. Marshall,
69 F.3d 957 (9th Cir. 1995) 9

TABLE OF AUTHORITIES, CONT'D

Harris v. Vasquez,
901 F.2d 724 (9th Cir. 1990) 10

Hendricks v. Calderon,
70 F.3d 1032 (9th Cir. 1995) 7, 11

Hendricks v. Calderon,
864 F.Supp 929 (N.D. Cal. 1994) 14

Herndon v. Lowry,
301 U.S. 242 (1937) 10

Holman v. Page,
95 F.3d 481 (7th Cir. 1997),
cert. denied, 117 S.Ct. 2414 (1997) 16, 17

Jeffers v. Lewis,
974 F.2d 1075 (9th Cir. 1992) 10

Jimenez v. Myers,
12 F.3d 1474 (9th Cir. 1993) 9

Jimenez v. Myers,
40 F.3d 976 (9th Cir. 1993) 9

Kimmelman v. Morrison,
477 U.S. 365 (1988) 13

Kyles v. Whitley,
514 U.S. 419 (1995) 22

Lockett v. Ohio,
438 U.S. 586 (1978) 10

TABLE OF AUTHORITIES, CONT'D

Lockhart v. Fretwell,
506 U.S. 364 (1993) 13, 14, 16, 19

McDowell v. Calderon,
107 F.3d 1351 (9th Cir. 1997) 9

McKenzie v. Day,
57 F.3d 1461 (9th Cir. 1995) 9

Moore v. Calderon,
108 F.3d 261 (9th Cir. 1997) 9

O'Dell v. Netherland,
___ U.S. ___,
117 S.Ct. 1969 (1997) 8

Ostrosky v. State of Alaska,
913 F.2d 590 (9th Cir. 1990) 10

Paradis v. Arave,
20 F.3d 950 (9th Cir. 1994) 9

Ricalday v. Procunier,
736 F.2d 203 (5th Cir. 1984) 17

Robbins v. Smith,
125 F.3d 831 (9th Cir. 1997) 9

Robinson v. Borg,
918 F.2d 1387 (9th Cir. 1990) 10

Rupe v. Wood,
93 F.3d 1434 (9th Cir. 1996) 9

TABLE OF AUTHORITIES, CONT'D

Smith v. Dixon,
766 F.Supp. 1370 (E.D.N.C. 1991),
aff'd 966 F.2d 667 (4th Cir. 1993) 8

Snook v. Wood,
89 F.3d 605 (9th Cir. 1996) 9

Strickland v. Washington,
466 U.S. 668 (1984) 7, 13, 16

Teague v. Lane,
489 U.S. 288 (1989) 8

White v. Illinois,
502 U.S. 346 (1992) 18

Wood v. Bartholomew,
516 U.S 1 (1993) 22

Constitutional Provisions

U.S. Const.
6th Amend. 12

Statutes

Cal. Pen. Code § 29
Stats. 1981, c. 404, § 5 22

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-

ARTHUR CALDERON, Warden, *Petitioner*,

v.

ROBERT MAURICE BLOOM, *Respondent*.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing the district court's judgment denying habeas corpus relief, is reported as *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997), and is reprinted in Appendix A of this Petition. The district court earlier had filed two opinions denying habeas relief: the first is published as *Bloom v. Vasquez*, 840 F.Supp. 1362 (C.D. Cal. 1993); the second is unpublished; and each is reprinted in Appendices B-C.

JURISDICTION

The Court of Appeals' judgment issued on December 24, 1997. This Petition for Writ of Certiorari follows within 90 days. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1, 13.4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Sixth Amendment of the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATUTORY PROVISION

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

1. The Crime.

In April 1982, Robert Maurice Bloom made inquiries about purchasing a gun because, as he told an acquaintance, he was going to kill someone. A few days later, Bloom told his father, "You are running my life now but you won't be for long." Bloom obtained a semiautomatic rifle and practiced shooting the rifle in a field.

On the night of April 22, Bloom armed himself with the rifle and walked to his father's house. Bloom and his father argued in the street, retreated to the house, and then emerged from the house again to continue their

dispute in the driveway. Bloom then shot his father, and continued to shoot him as his father staggered back toward the house. When his father fell over at the front door, Bloom stood over him and shot him in the head.

Bloom appeared to reload the rifle and entered the house again. Inside, as a neighbor heard a woman's screams, Bloom shot his stepmother to death. In another room a few moments later, he shot his eight-year-old stepsister in the head and arm and stabbed her twenty-three times. The little girl died the next day.

2. *The State Trial and Appeal.*

The State charged Bloom with three counts of first-degree murder, and alleged "multiple murders" rendering him eligible for the death penalty. Bloom pleaded "not guilty" to the charges; but, prior to trial, he changed his plea to the charge of murdering his stepsister to "not guilty by reason of insanity."

Bloom recounted to his defense lawyer the following version of the shootings: Bloom had armed himself with the rifle in order to chase some "cholos" from his girlfriend's house, and this escapade happened to bring him to his father's residence. Inside, Bloom's father concluded an argument with Bloom's stepmother by seizing the rifle and shooting her in the face. Bloom left the house with the rifle but, after his father followed him and promised to summon the police, Bloom agreed to go back into the house with him. Bloom's father, however, reneged on his promise to call the police. Bloom left the house again and, when the father compounded matters by making a threatening remark about Bloom's young stepsister, Bloom shot him. Bloom told his lawyer that he could remember nothing at all about the killing of the little girl.

Bloom insisted that he would testify to this account in court. And, indeed, he testified that way at his trial. His defense lawyer supplemented Bloom's testimony with that of a psychiatrist, Arthur Kling. The psychiatrist testified that Bloom suffered from "schizotypal personality disorder" characterized by magical thinking and bizarre fantasies, and that, when stressed, Bloom could experience a "transient psychotic episode" and might suffer from amnesia afterwards. The expert opined further that Bloom had shot his father while enraged after seeing his father kill his stepmother. The defense lawyer argued, in a way that harmonized Bloom's and the psychiatrist's testimony, that Bloom had not killed his stepmother, that he had killed his father in the "heat of passion," and that he had killed his stepsister after lapsing into a "transitory psychotic state." Success on these theories would have avoided death-penalty-eligibility, life-without-parole imprisonment, and even culpability for murder.

A jury found Bloom guilty of the multiple murders. Bloom thereupon withdrew his insanity plea. He also asked the court to allow him to act as his own lawyer in the sentencing phase so that he could urge the jury to impose the death sentence upon him. The court granted the request. At the penalty phase, the prosecution introduced aggravating evidence concerning Bloom's prior arrest for attempted robbery and carrying a concealed weapon. Bloom introduced no evidence of his own. In his argument to the jury, Bloom sought the death sentence. After four hours of deliberation, the jury gave it to him.

Bloom appealed the judgment but lost in the California Supreme Court. *People v. Bloom,* 48 Cal.3d 1194, 774 P.2d 698 (1989). This Court denied his petition for a writ of certiorari. *Bloom v. California,* 494 U.S. 1039 (1990).

3. The Federal Habeas Corpus Proceedings.

In 1990, Bloom filed a petition for writ of habeas corpus in the federal district court. He challenged, among other things, the effectiveness of his trial lawyer in preparing and presenting Dr. Kling's expert mental-state testimony. After an initial evidentiary hearing, the district court denied relief in a published opinion, *Bloom v. Vasquez,* 840 F.Supp. 1362 (C.D. Cal. 1993). After a second evidentiary hearing on an additional claim, the court filed another unpublished opinion again denying relief. (See Appendix C.)

On the issue of counsel's challenged delay in hiring the psychiatrist, the district court concluded that counsel had made a reasonable tactical decision motivated by the hope that petitioner, who appeared normal, might over time develop some objective symptoms of irrationality in jail. In rejecting the claim that counsel had failed to provide the expert with many documents concerning Bloom's mental history and physical abuse at the hands of his father, the district court concluded: that the expert had been adequately prepared to assist the defense; that his testimony supported the defense theories of innocence, heat of passion, and temporary psychosis; that counsel had provided the expert with more information than most forensic psychiatrists receive; and that counsel could not be deemed incompetent for failing to provide further information in the absence of a specific request by the expert.

The Court of Appeals for the Ninth Circuit reversed. *Bloom v. Calderon,* 132 F.3d 1267 (9th Cir. 1997). The appellate panel concluded that counsel's delay in hiring the expert, and his failure to provide the expert with "readily available" background data, had resulted in a "disaster": in the panel's view, the expert had formulated a hurried, damaging, and inaccurate pre-trial report that the prosecution later used with devastating effect on cross-

examination and in argument to challenge a revised opinion to which the expert had testified on direct examination for the defense. 132 F.3d at 1271-2, 1277-8.

The Court of Appeals also stated -- in a long stretch of the opinion that, it appears, did not figure in the holding -- that the expert indeed had broadly requested "all relevant data, psychiatric and social" from counsel; that such "readily available" data would have embraced reports of dysfunction in the Bloom family history, childhood abuse by Bloom's parents, Bloom's injuries and exposure to medications that often produce psychiatric consequences, Bloom's allegations of auditory and visual hallucinations, and his so-called "attempted suicide" in jail; and that, in light of the data produced a decade after the crimes by federal habeas corpus counsel, defense expert Kling now had revised his opinion yet again.

In the panel's view, the prosecution's "cross-examination not only negated Dr. Kling's testimony for the defense, it turned that testimony against him with devastating effect." 132 F.3d at 1273. The panel in the end determined that, because of counsel's culpable failure to provide the readily available data in response to the psychiatrist's request in the first place, the defense expert's testimony "not only failed to help the defense, it significantly hindered it." 132 F.3d at 1278. The Ninth Circuit concluded: "We are satisfied that had it not been for the deficient performance of Bloom's trial counsel, there is a 'reasonable probability' that the verdicts 'would have been different.' . . . Bloom has demonstrated he received ineffective assistance of trial counsel to his prejudice in violation of the Sixth Amendment." *Id.*

REASONS THE WRIT SHOULD BE GRANTED

Question 1.

The Ninth Circuit's resolution of the important question of a trial lawyer's Sixth Amendment responsibilities in shaping the materials a defense expert might consider in rendering an opinion in the expert's own field conflicts with the rule adopted on that question in the Eleventh Circuit, and represents yet another in a long line of cases in which the Ninth Circuit has failed to abide by the habeas corpus non-retroactivity doctrine announced by this Court in *Teague v. Lane*.

Mental-state defenses are common in murder prosecutions. Unfortunately common, too, are post-conviction attacks, particularly in capital cases, on defense counsel's actions with respect to obtaining expert opinion testimony on the issue of mental state for the defendant's benefit.

In the case at bar, the prisoner Bloom asserted that his trial counsel had been guilty of "deficient performance," the first prong of the two-pronged "performance" and "prejudice" standard for Sixth Amendment ineffective-counsel claims laid down in *Strickland v. Washington,* 466 U.S. 668 (1984). Bloom complained that counsel had not gathered and provided to the defense's expert psychiatrist, prior to the expert's written report and testimony, some alleged "readily available" materials reflecting Bloom's personal and medical history and that of his family.

Relying upon the Ninth Circuit's earlier opinion in *Hendricks v. Calderon,* 70 F.3d 1032 (9th Cir. 1995), the Eleventh Circuit's opinion in *Card v. Dugger,* 911 F.2d 1494, 1512 (11th Cir. 1990), and the district court's

published opinion in this very case, *Bloom v. Vasquez,* 840 F.Supp. 1362, 1370 (C.D. Cal. 1993), the State argued that no such duty existed. See also *Smith v. Dixon,* 766 F.Supp. 1370, 1390 (E.D.N.C. 1991), aff'd 966 F.2d 667 (4th Cir. 1993). The State further argued that to enforce a new rule imposing such a duty retroactively to grant collateral relief to Bloom in this case would violate the habeas corpus non-retroactivity doctrine of *Teague v. Lane,* 489 U.S. 288 (1989). (Appellee's Br. 55 & n. 37.) This Court's *Teague* doctrine precludes reliance upon any rule of law to grant habeas corpus relief to a state prisoner unless the rule had been "dictated" by precedent in a very strict sense -- that is, the unlawfulness of the prisoner's conviction would have been so beyond debate that no reasonable judge could have disagreed -- back at the time of finality of the state conviction. *O'Dell v. Netherland,* ___ U.S. ___, 117 S.Ct. 1969, 1973, 1977 (1997); *Graham v. Collins,* 506 U.S. 475, 477 (1994); *Butler v. McKellar,* 494 U.S. 407, 415 (1990).

In deciding the *Bloom* appeal, however, the Ninth Circuit proceeded to the merits of Bloom's claim without even mentioning *Teague*, and granted relief on the basis of a specious distinction between Bloom's case and the precedents upon which the State had relied. In going directly to the merits, the Ninth Circuit apparently flouted this Court's repeated procedural admonition that the lower federal courts first "must" resolve the issue of the State's "threshold" *Teague* defense before considering the merits of constitutional claims in habeas corpus cases. See *Goeke v. Branch,* 514 U.S. 115, 117 (1995) (per curiam); *Caspari v. Bohlen,* 510 U.S. 383, 389 (1994). This is not the first time the Circuit has done this. (See Petition for Certiorari filed in *Turner v. Marshall,* No. 97-1071, 12, 16.)

Worse, in granting habeas corpus relief on the merits, the Ninth Circuit once again failed to abide by the substance of the *Teague* doctrine. This is approximately the twentieth time, in just its published opinions, that the

Ninth Circuit has done this -- *i.e.,* granted habeas corpus relief on the basis of a rule of law that truly was "new" and thus unenforceable under the strict *Teague* standard.[1/]

---

1. When confronted with a *Teague* defense, the Ninth Circuit regularly finds no "new" rule or else finds exceptions to *Teague*. E.g., *McDowell v. Calderon,* 107 F.3d 1351 (9th Cir. 1997) (rule requiring trial judge to supplement correct instructions in capital case "represents a routine application of well settled law to the facts of the case"); *Robbins v. Smith,* 125 F.3d 831 (9th Cir. 1997) (rule invalidating California method for addressing no-merit appellate briefs "predetermined" by Supreme Court precedents); *Gallego v. McDaniel,* 124 F.3d 1065 (9th Cir. 1997) (Supreme Court opinion *upholding* a commutation instruction dictates *reversing* a death penalty conviction); *Moore v. Calderon,* 108 F.3d 261 (9th Cir. 1997) (rule of timeliness of self-representation motions is not "new" because Ninth Circuit had adopted it prior to the petitioner's state case); *Rupe v. Wood,* 93 F.3d 1434 (9th Cir. 1996) (*Teague* not implicated by a rule requiring admission of polygraph evidence); *Snook v. Wood,* 89 F.3d 605 (9th Cir. 1996) (*Teague* not a bar to requirement that state trial court conduct specified colloquy with criminal defendant prior to allowing self-representation); *Harmon v. Marshall,* 69 F.3d 957, 966-67 (9th Cir. 1995) (finding reasonable doubt instruction deficient in light of non-habeas Ninth Circuit precedent, and further finding the error met *Teague* exception of "fundamental fairness"); *Paradis v. Arave,* 20 F.3d 950 (9th Cir. 1994) (rejecting *Teague* defense on variety of issues without demonstrating identity of claim and prior precedent); *Fetterly v. Paskett,* 15 F.3d 1472 (9th Cir. 1994) ("notwithstanding the [Supreme] Court's crystal clear pronouncements, the panel rushes headlong to apply a new, incredibly broad rule [regarding construction of a criminal sentencing statute] retroactively to petitioner without even explaining why it may do so") (dis. op. to order denying rehearing); *McKenzie v. Day,* 57 F.3d 1461 (9th Cir. 1995) (*Teague* not implicated if underlying issue involves post-conviction proceedings); *Jimenez v. Myers,* 12 F.3d 1474 (9th Cir. 1993) (disapproving state method for dealing with deadlocked jury despite dissent's claim that "[i]f *Teague* does not bar retroactive application in these circumstances, it has no meaning at all"); *Jimenez v. Myers,* 40 F.3d 976 (9th Cir. 1993) ("amended opinion [construing trial judge's questions and comments as violating *Allen v. United States*, 164 U.S.

Here, the panel mustered no citations of any cases "dictating," at the time of finality of Bloom's conviction in 1990, a rule that defense counsel bears a constitutional duty to gather or choose material for a defense expert to consider in rendering his opinion. Instead, the panel merely purported to distinguish the prior precedents the State had cited, on the grounds that the expert in Bloom's

---

492 (1896)] is far more novel and far more dangerous than what the majority said the last time around") (dis. op., citing *Teague)*; *Beam v. Paskett,* 3 F.3d 1303 (9th Cir. 1993) (1937 precedent of *Herndon v. Lowry,* 301 U.S. 242, dictates in *Teague* sense the rule that trial judge's application of "continuing threat" aggravating death-penalty factor violates Eighth Amendment; alternatively, the rule satisfies both *Teague* exceptions); *Blazak v. Ricketts,* 1 F.3d 891 (9th Cir. 1993) (rejecting *Teague* defense to rule allowing consideration of evidence never presented in state court on question of mental competence); *Jeffers v. Lewis,* 974 F.2d 1075 (9th Cir. 1992) (rule regarding trial court's review of mitigation evidence in capital case was "dictated by prior [Ninth Circuit] precedent . . . [and] merely applied the teachings of *Lockett* [v. *Ohio*, 438 U.S. 586 (1978)] and *Eddings* [v. *Oklahoma*, 455 U.S. 104 (1982)"]); *Beam v. Paskett,* 966 F.2d 1563 (9th Cir. 1992) (*Teague* inapplicable if Ninth Circuit in other cases already had applied the rule retroactively); *Coe v. Thurman,* 922 F.2d 528 (9th Cir. 1990) (rule ordering a state court to decide appeal within a specified time period "is not the kind of rule to which *Teague* applies"); *Robinson v. Borg*, 918 F.2d 1387 (9th Cir. 1990) (applying rule regarding equivocal invocation of right to counsel over dissent's extended discussion of *Teague* bar); *Ostrosky v. State of Alaska,* 913 F.2d 590 (9th Cir. 1990) (rule regarding mistake-of-law defense falls within *Teague's* exceptions); *Harris v. Vasquez,* 901 F.2d 724 (9th Cir. 1990) (rule regarding competency of psychiatric assistance "at least arguably" satisfies *Teague* exception); *but see Gretzler v. Stewart*, 112 F.3d 992 (9th Cir. 1997). Against these twenty published cases, respondent has located only ten published cases in which the Circuit indeed applied Teague to bar a new rule.

In contrast, in only one of the thirteen cases in which this Court has decided a *Teague* challenge did it find the profferred rule to have been dictated by prior precedent and therefore not be "new." And, unlike the Ninth Circuit, this Court has never found a new rule to fall within either of the two exceptions to *Teague*.

case had actually requested such material from counsel. 132 F.3d at 1277-8. The panel's method of analysis is the antithesis of the *Teague* doctrine. Rather than treating the proffered rule as "new" and unavailable to grant relief unless all reasonable judges would have agreed on the rule's validity at the time of finality, see *Graham v. Collins,* 506 U.S. at 477, the panel treated the State's cited precedents as unpersuasive unless they absolutely "dictated" the denial of relief.

Finally, in purporting to distinguish away *Hendricks* and *Card* on the factual grounds it cited, the panel in effect created a conflict, or at least a troublesome inconsistency, between the Eleventh Circuit's *Card* rule and the new Ninth Circuit *Bloom* rule. The *Card* rule is that counsel bears no *Strickland* duty to provide background material to mental-state experts, at least where the experts do not consider themselves incapable of basing their conclusions on information they obtained throught their own efforts. 911 F.2d at 1512. Dr. Kling never made such a complaint at the time of Bloom's trial.

The conflict with *Card* becomes even more obvious because the distinction drawn by the *Bloom* panel is meaningless. The "readily available" background material cited at length by the panel had been specifically "requested" by the defense psychiatrist only in the hypertechnical sense that the expert had broadly and indiscriminately asked for "all relevant data, psychiatric and social" and "any additional information that might be available from the social history, family history or medical history." Defense counsel indeed had supplied the expert with a set of background documents. The precedents cited by the State, however, recognized that "[t]o require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with *all information necessary* to reach a mental health diagnosis demands that the attorney already be possessed of the skill and knowledge of the expert." *Hendricks,* 70 F.3d at 1038-9 [emphasis added].

A contrary rule "would raise the Sixth Amendment hurdle well above the floor of minimal competence, requiring attorneys to have the specialized knowledge to evaluate an expert's conclusions before relying upon them in making strategic choices." *Id.* at 1039.

The *Bloom* opinion not only created an impermissible "new" rule in violation of *Teague* but, in relying upon a meaningless distinction of precedent, adopted a rule that in effect operates to conflict with the *Card* rule. Certiorari should be granted in this case on the first Question Presented to eliminate the conflict and to ensure faithful enforcement by the lower courts of this Court's *Teague* doctrine.

Question 2.

Claims of ineffective assistance of counsel are epidemic in federal habeas corpus cases, particularly in capital cases, and the essential issue of the definition of the standard of prejudice after this Court's decision in *Lockhart v. Fretwell* is a subject of dispute and of conflict in the circuit courts of appeals.

Sixth Amendment claims of ineffective assistance of counsel run rampant through the federal habeas corpus courts, particularly in death-penalty cases.[2] This Court doubtless knows first hand, from the certiorari petitions

---

2. A computer search of 1997 Ninth Circuit opinions containing the phrases "Strickland v. Washington" and "ineffective assistance" identifies approximately 100 cases. Nationwide, in just the federal appellate courts, a similar search yields a list of more than 500 cases. Although not exact, this cursory search surely adumbrates an undeniably large number of *Strickland* ineffective-counsel cases in the system.

that come before it, that such claims indeed are staples of the habeas corpus crop.

A constitutional claim of ineffective counsel requires proof of both deficient performance by counsel and prejudice to the accused. *Lockhart v. Fretwell,* 506 U.S. 364, 369 n. 2 (1993). In *Strickland v. Washington,* 466 U.S. 668, this Court defined the standard of "prejudice" in various ways: it was said to require a "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," 466 U.S. at 687; and it was said to require a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

In *Kimmelman v. Morrison,* 477 U.S. 365 (1988), three members of the Court questioned whether a lawyer's incompetence in failing to object to otherwise reliable and probative evidence on search-and-seizure grounds could ever constitute "prejudice" under the Strickland test. The three concurring Justices noted that the logic of *Strickland*

> strongly suggests that only errors that call into question the basic justice of the defendant's conviction suffice to establish prejudice under *Strickland*. The question, in sum, must be whether the particular harm suffered by the defendant due to counsel's incompetence rendered the defendant's trial fundamentally unfair.

477 U.S. at 395 (conc. op.).

More recently, in *Lockhart v. Fretwell*, this Court dealt with an ineffectiveness claim premised upon a defense lawyer's failure to object to the sole death-penalty "eligibility" criterion found against his client, where the objection would have succeeded under case law that prevailed at the time of the trial but would not have succeeded under a later reversal of that case law. This Court explained that

> an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

506 U.S. at 369-70. "Sheer outcome determination," the Court recognized, "was not sufficient to make out a claim under the Sixth Amendment." *Id.* at 370; see *id.* at n.3. The Court further confirmed that the *Strickland* test "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair," and observed that "[u]nreliablity or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372.

The Court in *Fretwell* thus stated expressly that a "sheer outcome determination test" is "defective" and not sufficient to show prejudice. *Id.* at 369. But certain aspects of *Fretwell* lend themselves to arguments that the rule might still remain unsettled. One is the very oddity of the *Fretwell* situation, arising as it did from an intervening repudiation of case law that transformed what would have been a meritorious objection into a meritless one. Justice O'Connor, indeed, filed a concurring opinion indicating her belief that the "unusual circumstances" accounted for the result. 506 U.S. 373-5 (conc. op.).[3/]

---

3. Although the concurring opinion represented the seventh vote in *Fretwell,* and not a crucial one limiting the holding, it has been cited by lower courts as a reason for discounting the meaning of the *Fretwell* majority. *E.g. Battle v. Delo*, 19 F.3d 1547, 1555 n.3 (8th Cir. 1994); *E.g. Hendricks v. Calderon*, 864 F.Supp 929, 933 (N.D. Cal. 1994).

The second source of potential uncertainty involves the *Fretwell* Court's references to avoiding a "windfall to which the law does not entitle" the defendant." It is arguably ambiguous whether the Court was referring only to underlying federal constitutional rights -- like that which assertedly would have supported the objection Fretwell's lawyer ignored -- when it concluded that "unreliability or unfairness" would not result if counsel's incompetence did not also deprive the defendant of a "substantive or procedural right to which the law entitles him." Claims of unconstitutional ineffectiveness often involve assertions that trial counsel failed to take advantage of extra-constitutional rights and procedures available under state law. The validity of such claims -- resting on acts of omission or commission with respect to rights granted by state law and not to procedures required by the Constitution to insure a fundamentally fair trial -- depends upon the true meaning of *Fretwell.*

Until the *Strickland* prejudice issue is confronted in a conventional setting, rather than in an unusual one like in *Fretwell,* the authoritativeness and the scope of this Court's assessment that "outcome determination is not enough" will remain the subject of unnecessary contention and will threaten irregular application in the lower courts. This case offers such a typical setting for resolution of the second Question Presented. It also presents an array of facts that make resolution of the case turn on that Question. And it indicates, further, the existence of a conflict among the circuit courts of appeals on that Question.

*

Here, petitioner claimed that his counsel's performance was unconstitutionally deficient because, allegedly, counsel delayed for too long in hiring an expert and failed to provide the expert with information that would have helped him in evaluating Bloom and testifying at the guilt phase of the trial. The Ninth Circuit panel

decided that counsel's deficient performance resulted in *Strickland* prejudice because it unnecessarily subjected the psychiatric expert and petitioner's defense to "devastating" impeachment on cross-examination. The panel concluded only that, had it not been for the deficient performance, "there is a 'reasonable probability' that the verdicts 'would have been different.'" 132 F.3d at 1278. The opinion did not state that the panel found the result of the trial unreliable or the proceedings fundamentally unfair. Cf. *Fretwell,* 506 U.S. at 372; *Strickland,* 466 U.S. at 687. Nor did it contain any focused analysis that would have evidenced any actual consideration of fairness and reliability, as opposed to "outcome determination," at all. The opinion never adverted to the fact that the district court had applied the *Fretwell* "fundamentally unfair" standard in its opinion in this case, nor to the State's explicit argument in its appellate brief that *Fretwell* prohibited reversal in the absence of a showing of fundamental unfairness or unreliability. (Appellee's Br. 70-1.) Indeed, the opinion never referred to this Court's *Fretwell* decision even once.

The Ninth Circuit's reliance on sheer outcome determination conflicts with a proper understanding of *Fretwell*. It also conflicts with the decisions of the Fifth Circuit in *Goodwin v. Johnson,* 132 F.3d 162 (5th Cir. 1998), and the Seventh Circuit in *Holman v. Page,* 95 F.3d 481 (7th Cir. 1997), cert. denied, 117 S.Ct. 2414 (1997). In *Goodwin,* defense counsel on appeal had failed to challenge the trial court's refusal to instruct the jurors, under Texas state law, that they must disregard the defendant's confession if they doubted whether it had been the product of an illegal search. *Goodwin* refused to grant relief based upon an "outcome determination" theory, recognizing that the theory had been condemned as "defective" in *Fretwell,* and concluded instead that there had been no "prejudice" because the search-and-seizure evidence had not rendered the trial result fundamentally

unfair or unreliable. 132 F.3d at 170-176. Accord: *Ricalday v. Procunier,* 736 F.2d 203, 209 n. 6 (5th Cir. 1984) (unfairness-unreliabilty standard governed ineffectiveness claim premised upon counsel's failure to challenge jury instructions permitting a verdict on an offense beyond the terms of the indictment). Similarly, the Seventh Circuit in *Page* rejected an ineffectiveness claim based upon counsel's failure to object to evidence on search-and-seizure grounds, reasoning that the evidence did not render the trial unfair or unreliable regardless of its possible effect on the outcome. 95 F.3d at 490-2.

If the Ninth Circuit panel had considered *Fretwell* and applied it properly, habeas corpus relief in Bloom's case would have been denied. Read closely, through the haze of the panel's recitation of alleged social and psychiatric evidence that ultimately played no formal role in the resolution of the appeal, *Bloom* held only that counsel's alleged incompetence had "prejudiced" the defense because it resulted in an allegedly devastating or disastrous cross-examination of the defense psychiatrist by the prosecution on the subject of the expert's original and unrevised pre-trial report. 132 F.3d at 1272-3, 1277.

Although the panel described this original report in detail in its opinion, only parts of that report were made known to the jury through the prosecution's cross-examination. Those parts comprised, first, Bloom's acknowledgment that he had thought about killing his father in advance of the killing and that he intended to kill his father. Second, the cross-examination included the expert's prior opinions: that Bloom had been sane at the time of the crimes; that he had substantial mental capacity to know and understand the nature and wrongfulness of his conduct and to control his conduct; that he had the mental capacity to form specific intent to murder, to premeditate and deliberate, to meaningfully and maturely

reflect on the gravity of his conduct, and to harbor malice; and that he was competent to stand trial.

Nothing in the cross-examination suggests, let alone demonstrates, fundamental unfairness or unreliability. There has never been any question in this case that Bloom indeed had uttered the recited statements to the psychiatrist. And there is no doubt that the psychiatrist indeed had made the cited findings in his prior report. The evidence elicited in the cross-examination, further, was logically relevant to the material issues of Bloom's mental state and the credibility of the expert. As such, the evidence could not have rendered the trial unfair or unreliable, regardless of whether it might not have been admitted if counsel had acted differently. See *Estelle v. McGuire,* 502 U.S. 62, 67-70 (1991) (regardless of admissibility under state law or asserted prejudicial impact, admission of evidence logically relevant to a material issue does not violate Due Process Clause).

Moreover, nothing precluded the defense from eliciting further information on redirect examination to explain further the bases of the expert's opinion in light of the cross-examination. As the district court noted in its published opinion, the defense used its re-direct examination to elicit the expert's explanation that he had re-evaluated his opinion in light of a second and longer re-interview of the defendant. *Bloom v. Vasquez,* 840 F.Supp. at 1365 n. 2. He also further explained that his opinion on bare capacity concerned the killing of the father, that he was less certain about the stepsister, and that Bloom also had "capacity" for transient psychotic episodes. To protect Bloom, under the rubric of ineffective-counsel "prejudice," from the logical and probative inferences to be drawn from adversarial cross-examination -- "the greatest legal engine ever invented for the discovery of truth," *White v. Illinois,* 502 U.S. 346, 356 (1992) -- would amount to nothing less than bestowing upon him the kind

of "windfall" to which he had no constitutional entitlement. See *Fretwell,* 506 U.S. at 370.

Even if the panel's decision were interpreted in an overly broad way to comprise a holding that counsel prejudicially failed to provide the expert with information that would have enabled him to testify even more favorably for the defense -- a holding that, in the State's view, the Ninth Circuit never made -- proper resolution of the second Question Presented still would determine the disposition of this habeas corpus case and require reversal of the Ninth Circuit's decision. Here, the defense psychiatrist examined Bloom and a set of background materials. He then testified that, because of "schizotypal personality disorder," Bloom was subject to "transient psychotic episodes" during exposure to extreme stress. The expert testified, further, that it was unlikely Bloom during such an episode could control himself or that he could rationally understand what he was doing when he killed his stepsister; and that, during a transient psychotic episode, Bloom would be mentally disorganized. This evidence formed a logical basis for counsel's theory of defense. There is no suggestion in the Ninth Circuit opinion that this favorable defense testimony was false or unreliable, or that it itself somehow might have rendered the trial unfair to the defendant. Again, as with the cross-examination of the expert, the direct and re-direct examination of the expert did not result in a fundamentally unfair or unreliable trial.[4/]

---

4. The panel, it is true, characterized the expert's initial opinion in his first pre-trial report as "inaccurate." 132 F.3d at 1277. But the panel never characterized any parts of the report recounted in the testimony actually heard by the jury as inaccurate. Moreover, by "inaccurate" the panel apparently meant nothing more than that some unidentified opinions in the first report had been questioned in further opinions ventured by experts produced by Bloom in the habeas corpus case years after the crimes. There is no other likely basis in the record for the panel's conclusion. But to say that some

Anyway, even inadequate use of the psychiatric expert could not have resulted in a fundamentally unfair or unreliable trial. Any access to a court-appointed expert in Bloom's case was itself a "windfall" to which he was not entitled under the Constitution in the first place; and, even if not a "windfall," petitioner nevertheless received the very access to a competent psychiatrist that the Constitution otherwise might have demanded. This Court in *Ake v. Oklahoma,* 470 U.S. 68, 83 (1985), held that the Constitution required access to a competent psychiatrist at a guilt-innocence trial only when the defendant first demonstrates sufficiently that his sanity at the time of the offense will be a significant factor at the trial. Bloom never demonstrated that prior to his trial. Besides, under California law, Bloom's sanity defense would have been tried in a subsequent phase only if the jury first found him guilty of the substantive crimes. Cal. Pen. Code § 1026. Sanity was never a defense at the guilt trial that resulted in the only convictions Bloom attacks in these habeas corpus proceedings. In any event, even if the facts in this case somehow had triggered access to a competent psychiatrist under *Ake,* Bloom got that access, and more, when he obtained the services of Dr. Kling. The most that fundamental fairness under the Constitution would have required was affordng Bloom basic access to a qualified psychiatrist to aid the defense. See *Clisby v. Jones,* 907 F.2d 1047, 1049 (11th Cir. 1990), rehg. gtd., op. vac., 920 F.2d 720, op. on rehg., 960 F.2d 925, 934.

Finally, any contrast between expert Kling's trial testimony and his proffered new opinion, the one revised again on the basis of the additional allegations about Bloom's background offered in these federal habeas corpus proceedings, could not serve to illustrate that the

---

parts of the report were inaccurate in that sense hardly shows that the trial itself had been fundamentally unfair or its result unreliable in the *Strickland-Fretwell* sense.

trial had been fundamentally unfair or unreliable. In particular, expert Kling in his newest opinion appears to assume that Bloom indeed killed both his stepsister and stepmother. This assumption likely is the product of the experts review of reports prepared by another expert, Dr. Wolfson, in the federal habeas corpus proceedings. Bloom had told Dr. Wolfson that he had killed his stepmother and stepsister because they had been witnesses to his murder of his father. At the time of trial, of course, Bloom told his lawyer and his jury that he had not killed his stepmother and that he had no memory of whether he had killed his stepsister. Dr. Kling's new opinion, therefore, seems to follow on the heels of a brand new version of the events acknowledged by Bloom only after his trial had concluded.

Moreover, as noted above, expert Kling testified at trial that Bloom suffered from "schizotypal personality disorder," characterized by eccentric thoughts, bizarre fantasies, and paranoid ideation. Because of it, the expert explained, Bloom might have experienced a transient psychotic episode during which he was unaware of his actions. After the luxury of years of habeas corpus investigation unavailable to trial counsel, the same expert now opines that Bloom suffered from a mental disease "affecting" his ability to appreciate the nature of his conduct; that Bloom in fact had acted in response to parental abuse; and that Bloom "very likely" had been in a state of mental disorganization. These opinions are not very different from those he rendered at trial. The marginal differences do not show an unfair or unreliable trial result.

Dr. Kling, it is true, also ventures a new opinion that Bloom had not acted with deliberate reflection, thoughtful judgment, or consideration of the consequences. But it is inherently speculative when one purports to read a person's mind retrospectively more than a decade after the fact. Anyway, opinion testimony on the ultimate fact

of whether Bloom did or did not have a required mental state would have been inadmissible at Bloom's trial under California's rules of evidence. See [former] Cal. Pen. Code § 29 (Stats. 1981, c. 404, § 5) (restricting expert opinion testimony). If the evidence would have been inadmissible anyway, its absence cannot have resulted in *Strickland* prejudice. Compare *Kyles v. Whitley,* 514 U.S. 419, 434 (1995) (analogizing *Brady v. Maryland* suppression-of-exculpatory-evidence standard to that of *Strickland* prejudice) with *Wood v. Bartholomew,* 516 U.S 1, 6 (1995) (no *Brady* violation if suppressed evidence would have been inadmissible under state law).

Conversely, even the newest opinions of expert Kling include his acknowledgement that Bloom had the capacity to premeditate and that Bloom had intended to murder his father when he shot him. Even more important, the evidence leading up to the killing -- Bloom's advance statement of intent, his threat to his father, his securing of a rifle, his shooting practice, his act of arming himself before travelling to the murder scene, his repeated firing of the rifle, his pause to reload the weapon, etc. -- made it manifest that he had committed multiple first-degree murders with premeditation and deliberation.

The trial, therefore, was fair and the result was reliable. The Ninth Circuit's outcome-based *Strickland* analysis was not only "defective," see *Fretwell,* 506 U.S. at 369, but its mistake also determined the result of the *Bloom* appeal. Certiorari should be granted to settle the important *Strickland* question and to rectify the Ninth Circuit's error.

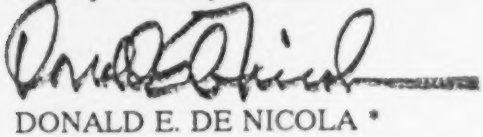
CONCLUSION

For these reasons, the State of California respectfully requests that this Court issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

Dated: March 20, 1998.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Deputy Attorney General
ROBERT M. SCHNEIDER
Deputy Attorney General



DONALD E. DE NICOLA *
Deputy Attorney General
* Counsel of Record
Counsel for Petitioner

DED:lpn
LA1995XF0004

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT MAURICE BLOOM,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden;
ATTORNEY GENERAL OF THE STATE
OF CALIFORNIA,
Respondents-Appellees.

No. 95-99005
D.C. No.
CV-90-02581-JSL
OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted
October 31, 1997—Pasadena, California

Filed December 24, 1997

Before: Stephen Reinhardt, David R. Thompson and
Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals reversed a judgment of the district court. The court held that a criminal defense attorney renders ineffective assistance by failing to provide readily available evidence on a capital defendant's background of mental illness when an expert defense psychiatric witness requests it.

Appellant Robert Bloom has a psychiatric history going back to his early childhood. He suffered severe physical and psychological abuse from his parents, exposure to drugs that may have affected his mental state and caused neurological injury, and a drastically dysfunctional family. Following his arrest for attempted robbery, Bloom was diagnosed as a person who presented a danger to himself and others due to psychiatric problems.

When he was 18 years old, Bloom shot and killed his father, his stepmother, and his stepsister. He was charged with three counts of first-degree murder with special circumstances.

Bloom's defense counsel was appointed in August 1982. In October, he obtained an order for the appointment of a psychiatrist to examine Bloom and a neurologist to produce an electroencephalogram.

In April 1983, defense counsel secured an order allowing Dr. Sergio Fuenzalida to conduct a neurological examination of Bloom. Defense counsel did not inform Fuenzalida of the charges against Bloom, the nature of the proceedings underlying his appointment, or the purpose of his evaluation. The attorney did not provide Fuenzalida with anything on Bloom's history of mental illness. Fuenzalida's report stated that Bloom had a normal developmental history, that there was no indication of brain damage, and that the electroencephalogram was normal.

Cathy Drury, defense counsel's law clerk, drafted an order appointing Dr. Arthur Kling as a defense psychiatrist. The order asked Kling to give his opinion as to whether, at the time of the killings, Bloom had the capacity to form specific intent, to deliberate, to premeditate, to harbor malice, and to meaningfully and maturely reflect on the gravity of his acts.

Because defense counsel was consistently unavailable to discuss the case, Drury had to draft the order without guid-

ance or knowledge of the theory of defense. After she drafted the order, Drury left defense counsel's office to study for the bar examination. When she returned, she called Kling to determine when his report would be ready. Kling informed Drury that he had never heard of Bloom: the appointment order had not been filed or signed, and trial was to commence within three weeks. Kling agreed to examine Bloom and have his report prepared two weeks before trial if he were appointed.

Drury's notes indicated that Kling asked defense counsel for all relevant psychiatric and social data on Bloom, as well as information from his social, family, and medical histories. Defense counsel did not speak to Kling before the Bloom interview. He provided only the order of appointment; a transcript of the preliminary hearing; Fuenzalida's report; and various documents having little or no bearing on Bloom's mental state.

Kling reviewed the materials provided by defense counsel and interviewed Bloom for about 90 minutes. In his report he opined that Bloom killed his father because he would not let Bloom marry his girlfriend or continue their relationship. He speculated that Bloom killed his stepmother and stepsister because they were witnesses to his father's murder. Kling noted that Bloom showed no guilt or remorse, and no indication of intellectual deficiency, cognitive deficit, or psychiatric condition that would produce a misperception of reality. He stated that he believed that at the time of the murders, Bloom had the capacity to form the specific intent to murder, to deliberate, and to premeditate. In Kling's view, Bloom would not have benefited from treatment in a mental facility.

Kling examined Bloom again during trial. This time he opined in his report that Bloom had a "schizotypal" personality disorder, could experience transient psychotic episodes when under stress, and might suffer amnesia and unawareness of his acts during such events. Bloom attempted suicide in

jail. A jail psychologist noted that Bloom had reported hallucinations. Defense counsel did not obtain or develop this evidence.

Kling was the sole defense expert witness. He testified in accord with his second report. Defense counsel ignored the first report. However, the prosecution stressed it in cross-examination and closing argument, effectively negating Kling's testimony for the defense, and using his original opinion to destroy Bloom's mental incapacity defense. A jury convicted Bloom as charged.

Bloom withdrew his insanity plea and represented himself during the penalty phase. He presented no mitigating evidence and asked the jury to return a verdict of death. The jury did so. The trial court declined to modify the jury's verdict and sentenced Bloom to death.

The California Supreme Court affirmed on direct appeal and on Bloom's appeal from the denial of his state habeas corpus petition.

On federal habeas corpus, new defense counsel presented evidence of Bloom's history of mental illness, as well as a psychiatric report, prepared in connection with the attempted robbery charge, stating that he was in need of inpatient treatment only five months before the killings. Kling and other physicians who examined Bloom opined that trial counsel had provided insufficient information, and that their initial evaluations were inaccurate as a result. They concluded that Bloom suffered from a mental disease that affected his ability to appreciate the nature of his acts at the time of the murders.

Dr. William Vicary, who had been appointed by the trial court to determine Bloom's competency to be sentenced, concluded that the evidence that trial counsel had failed to provide showed that Bloom suffered from serious mental disorders and brain damage. This conclusion was supported

by the opinion of Dr. Dale Watson, who said that Bloom's brain dysfunction and damage were longstanding and predated the offenses of conviction. A social worker's declaration described Bloom's clinical mental instability and attributed it to severe trauma.

Trial defense counsel testified that he could not recall details about his representation of Bloom, or whether Kling had requested any background information on Bloom. He did recall that Kling had at some time requested "certain materials."

The district court concluded that Kling had not requested any background information on Bloom, and that absent such a request, counsel was under no obligation to provide Kling with such material. The court denied Bloom's petition. He appealed.

[1] The complete lack of effort by Bloom's trial counsel to obtain a psychiatric expert until days before trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance. [2] Counsel does not have a duty to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert. However, the record did not support the district court's finding that Kling did not request background information on Bloom.

[3] Rather than supporting a finding that Kling did not request information, the testimony of Bloom's trial counsel supported a finding that such a request was made. [4] The district court's finding that Kling did not request any information or documents was clearly erroneous. Kling requested information and relevant documents, all of which were available and could have been provided, but were not. Bloom's trial counsel either had significant evidence relating to Bloom's mental state at the time of the murders, or he easily could have

obtained that evidence. Trial counsel never consulted Bloom's jail medical records, which were readily available. They indicated that Bloom had attempted suicide and was suffering from hallucinations.

[5] When the defense's only expert requests relevant information that is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert's flawed testimony at trial, counsel's performance is deficient.

[6] Trial counsel's deficient performance prejudiced Bloom during the trial phase of his case. Prejudice in this context is prejudice that undermines confidence in the outcome of the trial. [7] Counsel's theory of defense rested at least in part on a psychiatric defense. As a result of counsel's deficient performance, Kling was not provided with sufficient information and as a result, his testimony not only failed to help the defense, it significantly hindered it. Kling's inaccurate report permitted the prosecution to turn Kling's trial testimony against Bloom, and gave the prosecution the ammunition it needed to secure guilty verdicts of first-degree murder with special circumstances.

[8] Had it not been for the deficient performance of Bloom's trial counsel, there was a reasonable probability that the verdicts would have been different. Bloom demonstrated that he received ineffective assistance of trial counsel to his prejudice in violation of the Sixth Amendment.

COUNSEL

Dennis P. Riordan, Riordan & Rosenthal, San Francisco, California, for the petitioner-appellant.

Robert C. Schneider, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

THOMPSON, Circuit Judge:

I

OVERVIEW

A jury convicted Robert Maurice Bloom of three counts of first degree murder and imposed the death penalty. The state trial court declined to modify the jury's verdict and sentenced Bloom to death. After exhausting his state court remedies, Bloom filed his first federal habeas corpus petition in the district court. The district court denied the petition and Bloom appeals.

Bloom argues an actual conflict of interest adversely affected his state trial counsel's representation, he received ineffective assistance of counsel during the guilt phase of his trial, he is entitled to a new penalty phase trial based on his counsel's alleged ineffective assistance during the guilt phase, and his jury considered extrinsic evidence during their deliberations in the penalty phase.

We have jurisdiction pursuant to 28 U.S.C. § 2253, and we reverse. We conclude Bloom received constitutionally ineffective assistance of counsel during the guilt phase of his trial. We do not reach his other arguments.

II

FACTS

This is yet another case of severe childhood abuse ending in tragedy. A jury found Bloom guilty of shooting and killing his father (Robert Bloom, Sr.),[1] his stepmother (Josephine

[1]This opinion refers to the petitioner as "Bloom" and to his father as "Bloom, Sr.".

Lou Bloom), and his eight-year-old stepsister (Sandra Hughes). Bloom was eighteen years old at the time of the murders.

The prosecution presented substantial evidence against Bloom. One witness testified that approximately a week before the murders Bloom asked him if he could buy a gun because he was going to kill someone. The witness agreed to obtain a gun for Bloom but never did so. Another witness testified that two days before the murders Bloom told his father on the telephone, "You are running my life now but you won't be for long."

At the time of the murders Bloom was living with his girlfriend, Christine Waller. She testified that two days before the murders she observed Bloom walking in a field behind her house carrying a rifle. Waller's brother owned a .22-caliber semiautomatic rifle. The rifle was missing after the murders and, to date, has not been found. The victims were shot with bullets from such a rifle.

On April 22, 1982, at about 4:00 a.m., David Hughes, who lived next door to Bloom, Sr., heard Bloom, Sr. shout: "Robert, Robert. Come back." Hughes looked out the window and saw Bloom, Sr. standing at the end of the driveway. Bloom, Sr. then ran down the street toward Bloom.

Another witness, Moises Gameros, testified he then saw Bloom, Sr. and Bloom arguing in the street. Gameros heard Bloom, Sr. say: "That's it. I'm going to call the police."

Bloom, Sr. and Bloom then returned to Bloom, Sr.'s house and entered the house. Bloom was carrying a rifle but was not pointing it at anyone. Minutes later, Hughes heard shouting. Hughes saw Bloom, Sr. standing in the driveway and heard him again ask Bloom to come back. Both Hughes and Gameros then heard popping which they recognized as gunfire.

Bloom, Sr. began screaming, grabbed his midsection, and ran to his house. Bloom followed Bloom, Sr. and continued to shoot him. Bloom, Sr. eventually fell on his back in the doorway. Bloom then stood over him and shot him twice in the head.

Bloom appeared to reload the rifle before he reentered the house. Hughes heard a woman's scream followed by two shots. After a short pause, Hughes heard a third shot. Bloom walked out of the house, placed the rifle in a car belonging to Josephine, and drove off.

Police officers arrived shortly thereafter. Bloom, Sr. and Josephine were dead. Sandra was still alive, but critically wounded. Sandra had been shot in the head and had also suffered twenty-three "sharp force" stab wounds to her forehead, neck, right arm, and left back. These wounds apparently were made by scissors which were located near her body. Sandra died the next day.

Bloom was arrested within an hour after the murders. He had blood on his hands and shoes. He was not in possession of a rifle. Although the murder weapon was never found, there is no dispute that the victims were shot with a .22-caliber rifle.

Bloom initially pleaded not guilty to the three murders. Before trial, he changed his plea to the murder of Sandra to not guilty by reason of insanity.

At trial, Bloom testified that on the morning of the murder he took the rifle and chased some "cholos." He followed them until he was near Bloom, Sr.'s house. He went inside the house and placed the rifle on a chair. Bloom Sr. and Josephine were arguing because she wanted a divorce. According to Bloom, Bloom, Sr. then shot Josephine in the face and, as she was walking toward Bloom, Bloom, Sr. shot her a second time.

Bloom testified he picked up the rifle, left the house, and agreed to return only after Bloom, Sr. agreed to call the police. When they reentered the house, Bloom, Sr. refused to call the police, Bloom left the house, and, after Bloom, Sr. made a remark about Sandra, Bloom shot him. Bloom said he did not remember anything else until he was arrested.

The jury found Bloom guilty of all three counts of first degree murder. After the jury returned its verdict, Bloom withdrew his insanity plea and asked the court to let him represent himself during the penalty phase. He told the court he intended to ask the jury to return a verdict of death. The court granted Bloom's request.

During the penalty phase, the prosecution presented evidence of a prior arrest for attempted robbery and for concealing a weapon. Bloom presented no mitigating evidence. In his closing argument, he told the jurors there were no mitigating circumstances and asked them to impose the death penalty. After four hours of deliberation, the jury returned a verdict of death.

After the jury's verdict in the penalty phase, Bloom was involved in a violent jail incident. He was relieved of his self-representation status and a hearing was held to determine his competency. A jury found him to be competent. The state trial court then declined to modify the jury's verdict and sentenced Bloom to death.

The California Supreme Court consolidated Bloom's direct appeal with his appeal from the denial of his first state habeas corpus petition. The California Supreme Court affirmed Bloom's convictions, his death sentence, and affirmed the denial of his state habeas petition. *People v. Bloom*, 48 Cal. 3d 1194, 774 P.2d 698, 259 Cal. Rptr. 669 (Cal. 1989). The United States Supreme Court denied certiorari. *Bloom v. California*, 494 U.S. 1039 (1990).

Bloom then filed his first federal habeas petition. The district court denied the petition, *see Bloom v. Vasquez*, 840 F. Supp. 1362 (C.D. Cal. 1993), and this appeal followed.

III

DISCUSSION

At trial, Bloom's trial counsel pursued a defense that Bloom did not kill his stepmother, he killed his father while in a heat of passion after witnessing his father kill his stepmother, and he was in a "transitory state" when he killed his stepsister. This is the story Bloom told his counsel, and it is the story Bloom told when he testified at trial.

Bloom's defense, at least in part, was based upon his contention that he lacked the necessary mental capacity for premeditation, malice, and the intent to kill. To support this defense, Bloom's trial counsel hired Arthur S. Kling, M.D., a psychiatrist. Bloom argues his counsel's performance was constitutionally deficient because counsel inexcusably delayed hiring Dr. Kling until shortly before trial, and then did not provide Dr. Kling with necessary and available data which Kling requested and which would have assisted him in his evaluation of Bloom and in his trial testimony.

To prevail on this claim, Bloom first must establish that his " 'counsel's representation fell below an objective standard of reasonableness . . . considering all the circumstances . . . under prevailing professional norms.' " *Harris v. Wood*, 64 F.3d 1432, 1435 (9th Cir. 1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). He must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Bloom also must establish that prejudice resulted from the deficient performance. *Harris*, 64 F.3d at 1435. He must dem-

onstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

As discussed in more detail below, Bloom's trial counsel did virtually nothing to obtain the services of Bloom's key witness—the psychiatrist, Dr. Kling—until only a few days before trial. Counsel then did practically nothing to prepare Dr. Kling for his examination of Bloom. This resulted in a severely damaging psychiatric report from Kling, a report the prosecution used effectively in cross-examining Kling and in closing argument.

A. *Preparation and Trial Evidence*

Bloom's trial counsel was appointed on August 5, 1982. In September 1982, counsel moved the state trial court for the appointment of a psychiatrist to examine Bloom and a neurologist to conduct an electroencephalogram. On October 7, 1982, the court granted the motion, and told counsel to "fill out the form."

In November 1982, counsel sought a postponement of the trial date. The court continued the trial to January 20, 1983, and then in January continued the trial again. By March 1983, counsel still had not taken any steps to obtain a psychiatrist or neurologist, although he informed the court at that time that he needed a continuance because he was "not through with psychiatric and clinical testing as well as neurological evaluation." The trial date was continued again in May and June 1983 because counsel was involved in civil trials and he represented that this case was complex and he needed more time to prepare.

In April 1983, counsel obtained an order directing the sheriff to deliver Bloom to Dr. Sergio Fuenzalida for a neurologi-

cal exam. Fuenzalida's report states Bloom "had a normal developmental history," "there is no basis for brain damage," and the electroencephalogram was "normal." The report also states Bloom said he had been experiencing blackouts since he was nine years old. The report concludes the "nature" of the blackouts is "more difficult to determine."

In May 1983, Cathy Drury, a third-year law student working in counsel's office, drafted the order appointing Dr. Kling. The appointment order consists of a form in which certain questions are marked for Kling to answer. The appointment order asked Kling to give his opinion as to whether, at the time of the murders, Bloom had the capacity to form specific intent, to deliberate, to premeditate, to harbor malice, and to meaningfully and maturely reflect upon the gravity of his acts. At this time, California had abolished the diminished capacity defense. Cal. Penal Code § 28(a), (b).

Drury drafted the order without any guidance from counsel. During the evidentiary hearing in the district court, she testified that counsel was "very rarely available" because "[h]e often would disappear for hours at a time, and he would go across the street and be at the bowling alley playing Pac-Man and we'd have to go get him. And he really wasn't available to discuss matters with." She testified everyone at the firm was "concerned about [counsel's] lack of preparation."

After drafting the appointment order, Drury left counsel's office to study for the Bar examination. After the Bar examination, she returned. On August 4, 1983, counsel asked her to contact Kling to ask him when he would have his report completed. Drury then called Kling, and he told her he "had never heard of Robert Bloom" and had not been appointed. The order Drury drafted had not been signed or filed, and the trial was to begin on August 24. Kling told Drury that, if he were appointed, he would examine Bloom on August 6 and prepare a report by August 10.

Drury panicked. She wrote counsel a note stating that she needed to draft a letter to Kling outlining the theory of defense. She testified before the district court that she had asked counsel for assistance in preparing the letter because she "didn't know what the theory of the defense of the case was . . . ." She further testified that counsel never did discuss the theory of defense with her. The letter was never written.

Drury's notes reflect that Kling had asked counsel to provide him with "all relevant data, psychiatric and social" and "any additional information that might be available from the social history, family history, medical history." Counsel, however, did not speak with Kling prior to the Bloom interview, and provided Kling with only the following documents:

(1) The order of appointment.

(2) The transcript of the preliminary hearing.

(3) A "Make Believe Interview," which appears to be a school assignment written by Bloom. The interview merely talks about the use of drugs.

(4) An essay about crime. In this essay, Bloom states that children from broken homes may be criminally inclined and that the world is full of hate and violence, which leads to crime.

(5) A letter from Bloom's mother, Melanie Bloom, to the state trial court, which primarily complains about the performance of Bloom's counsel during the preliminary hearing.

(6) A document entitled "Things I saw Robert H. Bloom Do," apparently written by Melanie Bloom. The incidents focus primarily on Bloom getting into trouble. The incidents listed are not severe or eccentric. For example, the document states Bloom

"smiles a lot" and "makes very dark dots when he writes a period."

(7) A statement from Melanie Bloom. In this document, Melanie states she had physical fights with Bloom, Sr.; hated him; and wanted to kill him. She also states she attempted suicide, had "grand mal," and referred to a pool incident in which Bloom almost died. The statement does not mention the physical abuse suffered by Bloom and makes only confused references to Bloom's mental state.

(8) Telegrams and letters from Bloom, Sr. to Bloom while Bloom, Sr. was in jail. The letters consistently state that Bloom, Sr. loves Bloom and will always be there for him.

(9) A copy of a home economics scholastic award given to Bloom in high school.

(10) A certificate of honorary discharge.

(11) Dr. Fuenzalida's neurological report.

Kling reviewed the limited materials provided by counsel and interviewed Bloom for approximately an hour-and-a-half. In his report issued in August 1983, Kling stated that, during the interview, Bloom said he killed his father because he learned Bloom, Sr. was sexually molesting his stepsister, Sandra, and he felt his father deserved to die. Bloom denied any mental illness and said he had seen a psychiatrist only once.

Kling then prepared his opinion. It was devastating. He wrote:

I would speculate that the reason he did kill his father may not have been because he found out about his father molesting [Sandra] but because his father

> would not let him marry or continue the relationship with [Bloom's girlfriend].
>
> . . .
>
> I speculate further that the defendant may have killed his stepmother and his stepsister, [Sandra], to prevent them from testifying to the murder . . . .
>
> . . .
>
> Most remarkable is his lack of guilt, remorse, or feelings regarding his act or any of the anti-social behavior he had been engaged in. He attempts to justify everything he did without insight or judgment. His verbal ability is excellent and he has clearly no evidence of intellectual deficiency or cognitive deficit. Finally, there is no evidence of paranoid thinking or delusions or disorganized thinking which would have led to a misperception of the reality that he describes.

Kling also stated in the report his belief that, at the time of the murders, Bloom had the capacity to form the specific intent to murder and to deliberate and premeditate. He also opined that Bloom should not be admitted to a mental facility and would not benefit from treatment in a mental facility.

Kling followed his report with a letter written August 17, 1983, regarding the murder of Sandra. In that letter, Kling stated:

> [T]here was no indication of any motive for him to be responsible for [Sandra's] death except for the possibility that she was a witness.
>
> . . .

> [I]t would not seem unlikely, considering the extent of the injuries of Sandra Hughes and the circumstances surrounding the event, that the defendant was at the time unable to control his behavior as well as being unable to know what he was doing in a rational manner. It is not unlikely that the defendant was in a state of extreme stress, mental disorganization, and anxiety resulting from the shooting of [his] father so that the subsequent events resulting from amnesia would be in keeping with his disorganized mental state at the time.

During trial, Kling interviewed Bloom for a second time. After this interview, Kling opined Bloom had a "schizotypal personality disorder" and, as such, could experience "transient psychotic episodes" when under extreme stress. During such an episode, Bloom may suffer amnesia and "might not be aware of what it is [he is] doing."

At trial, Kling was the sole defense expert witness. On direct examination he testified in accord with his second report — that Bloom suffered from a "schizotypal personality disorder" and may experience "transient psychotic episodes." Trial counsel did not refer to Kling's first report or make any effort to diffuse it. He simply ignored it.

As might have been expected, on cross-examination the prosecution focused on Kling's first report. The prosecution brought out Kling's original opinion that Bloom was sane at the time of the murders, and that he had the capacity to know and understand what he was doing, to form the specific intent to murder, to deliberate and premeditate, to harbor malice, and to meaningfully and maturely reflect upon the gravity of his acts. This cross-examination not only negated Dr. Kling's testimony for the defense, it turned that testimony against Bloom with devastating effect. Then, in closing argument, the prosecutor returned to Kling's first report. The prosecutor read parts of the report to the jury and emphasized that

Bloom's "own doctor says he was sane and that he could form the malice and premeditation and deliberation necessary for murder in the first degree." And that's what the jury convicted Bloom of, on all three counts.

B. *Evidence Presented by Current Counsel*

After the death penalty was imposed, new counsel was appointed to represent Bloom in his post-conviction, post-sentencing proceedings. His new counsel presented significant evidence relating to Bloom's mental state at the time of the murders. Although this evidence was readily available to Bloom's trial counsel, his trial counsel had failed to provide the information to Dr. Kling or to any other physician who examined Bloom. The information discloses that Bloom suffered a long history of severe childhood abuse. He was born into a family plagued by generations of mental illness and domestic abuse. Both of Bloom's grandfathers physically abused their wives and Bloom, Sr. was subject to physical abuse from his father. Bloom's paternal grandfather was hospitalized "for episodes described as 'nervous breakdowns.' " There was more.

The marriage of Bloom's parents (Bloom, Sr. and Melanie) also was severely dysfunctional. Bloom, Sr. physically abused Melanie, and both Bloom, Sr. and Melanie physically abused Bloom. The physical abuse began when Bloom was very young. On one occasion, Melanie threw Bloom across the room when he was a baby. Melanie also held a gun to Bloom's head for forty-five minutes because Bloom would not reveal the identity of "Tony," Bloom's imaginary friend.

Melanie divorced Bloom, Sr. when Bloom was six years old. Bloom was then left in Bloom, Sr.'s care.

Bloom, Sr. physically abused Bloom throughout Bloom's life. The nature of this abuse is summarized as:

> [Bloom, Sr.] initiated an almost ritualized sequence in which he would push, slap, and punch [Bloom], all the while working himself into an escalating rage. He would then grab [Bloom] by the hair and yank his head down, throwing him to the floor. He would then pounce on [Bloom], who would be lying face down, and push his head into the floor or carpet. [Bloom, Sr.] would then pound [Bloom] with closed fists all over his back while screaming obscenities. At various other times [Bloom, Sr.] used a variety of different objects to beat [Bloom]. There are specific references, from [Bloom] and contemporary witnesses, of a telephone and a baseball bat being used.

Bloom suffered from illnesses and was exposed to medications which could affect his mental state. Since her birth, Melanie, Bloom's mother, had epilepsy and suffered grand mal seizures. During her pregnancy with Bloom, Melanie took Dilantin, which is "a powerful anti-epileptic medication now known to cause physical malformations and central nervous system damage to infants exposed prenatally to it."

When Bloom was two years old, he almost drowned in a swimming pool. He was rushed to a hospital and pronounced dead on arrival. He was revived after a cardiac injection of adrenaline.

At age eleven, Bloom became chronically ill with a nephrotic kidney condition. He was given "prednisone, a powerful steroid that often causes psychiatric consequences . . . ." This medication caused him to develop Cushing Syndrome, which "frequently leads to psychiatric symptoms that include psychosis and agitation."

In addition to the foregoing, current counsel presented evidence that within five months before the murders, a psychiatric report had been prepared which stated Bloom was in need of inpatient psychiatric care. The report was prepared in con-

nection with an incident which occurred in November 1981. Bloom had been arrested for robbery after he attempted to steal a purse from a woman in a bible study class. He was arrested after police officers observed him acting strangely. After this 1981 arrest, the state court appointed Dr. Richard Naham, a psychiatrist, to evaluate Bloom. In his report, Dr. Naham opines:

> (1) The defendant *is* a potential danger to himself and to others in the community.
>
> (2) He *would* benefit from inpatient psychiatric treatment in a state psychiatric hospital.
>
> (3) He is *not* presently suitable for outpatient treatment.
>
> . . .
>
> I recommend that he be committed to a state psychiatric hospital with adequate security precautions, until such time as he has improved enough to no longer be a danger to the community, and has obtained sufficient insight to benefit and participate meaningfully in outpatient psychiatric treatment. There is no doubt in my mind that without suitable inpatient psychiatric treatment he will continue to present an inordinate danger to others. (Emphasis in original).

Jail records during Bloom's pretrial and trial incarceration on the murder charges in this case also evidence the possibility that Bloom was suffering from a mental illness. Prior to trial, Bloom attempted suicide. The jail medical records show that he was referred for psychiatric observation and treatment. A jail psychologist reported that Bloom "experienced auditory and visual hallucinations and could 'see things in the future.' " Although easily obtainable, Bloom's trial counsel gathered none of this evidence.

Bloom's current counsel presented all of the foregoing information to Dr. Kling and the other physicians who evaluated Bloom. These physicians, including Dr. Kling, submitted declarations during the post-conviction, post-sentencing proceedings in which they opine that Bloom's trial counsel provided insufficient information. They state that, as a result, the initial evaluations were inaccurate, and they opine that Bloom suffers from a mental disease which affected his ability to appreciate the nature of his acts at the time of the murders. The following summarizes these current declarations.

Dr. Kling states the documents he received from Bloom's current counsel were "critical to any reliable assessment of [Bloom's] mental functioning at the time of the offenses . . . ." He further states:

> I had not been briefed on the mental state issues that would be raised at [Bloom's] trial. I viewed my original report as an effort to assess, on the basis of a brief interview, [Bloom's] ability to stand trial and to formulate a psychiatric diagnosis.

After reviewing the information provided by Bloom's current counsel, Kling opines:

> Mr. Bloom's actions were triggered and governed by a predictable and intense emotional response to years of abuse and victimization by his father. Mr. Bloom's actions were not the result of deliberate reflection, thoughtful judgment, or even remote consideration of the consequences of his deeds.
>
> . . .
>
> [A]t the time he shot his stepmother and shot and stabbed his stepsister, he was very likely in a state of mental disorganization. These latter two homicides

> were surely not the product of careful thought, reflection, or a weighing of consequences . . . .

Dr. Fuenzalida, the doctor who performed the neurological evaluation for Bloom's trial, states that when he agreed to conduct the trial evaluation, he "expected to be further consulted regarding the purpose of the examination and provided with information regarding Mr. Bloom and the circumstances of the crime for which he was charged." He, however, "merely received notice that [he] had been appointed by the court and that Mr. Bloom was to be transported to [his] offices for the neurological examination." Fuenzalida was not "informed of the specific charges or of the nature of the proceedings" against Bloom and "was never told to what purpose [his] evaluation was to be used." After reviewing the documents presented by Bloom's current counsel, Fuenzalida opines:

> I believe that the circumstances surrounding Mr. Bloom's referral to me and my neurological evaluation led to an incomplete and misleading assessment of Mr. Bloom's mental status at the time that I examined him.
>
> . . .
>
> My neurological evaluation and preliminary diagnosis should not and may not be read to exclude the possibility that Mr. Bloom may have had brain damage at the time of my examination.
>
> . . .
>
> Indeed, unaware of the purpose of my evaluation, I assumed — incorrectly — that my services were sought to determine whether Mr. Bloom suffered from a seizure disorder.

> The focus of my evaluation was skewed because [trial counsel] failed to provide me with background information relevant to Mr. Bloom's mental functioning.
>
> . . .
>
> Because I lacked even rudimentary information about the purpose of my evaluation and Mr. Bloom's history, I was forced to rely entirely on Mr. Bloom's self-reporting for this critical information. Thus, I was unable to tailor my evaluation accordingly or to interpret accurately the information provided me by Mr. Bloom.
>
> [The information provided by current counsel] would have provided me with further avenues of inquiry, and more specifically they would have alerted me that Mr. Bloom's blackouts were not a result of seizure activity, but rather had psychiatric origins.

During the trial, other physicians had examined Bloom and reported on his mental status. After Bloom entered a plea of insanity, the state trial court appointed Dr. Julian Kivowitz to examine him. Kivowitz was asked to determine whether Bloom was sane at the time of the murders and whether he had the capacity to deliberate, premeditate, and meaningfully reflect upon the gravity of his actions.

Kivowitz states that, for his initial evaluation, he was given only the order of appointment, and at the time of the initial evaluation he was not even aware that Bloom had been charged with the murders of his stepmother and stepsister or that Bloom had entered a plea of not guilty by reason of insanity. He states the information provided by current counsel was "critically relevant" to an accurate evaluation. He opines his original evaluation "was not only irrelevant but

also drastically misleading." After reviewing the information provided by current counsel, Kivowitz opines:

> Mr. Bloom's actions on the day of the offense resulted from overwhelming terror that any reasonable person would experience if subjected to years of similar abuse as a child.
>
> . . .
>
> [F]ollowing the firing of the first shot at his father, Mr. Bloom was in a transitory dissociative state, and experiencing an episode of intermittent altered mental state. Thus, due to his mental impairments and dissociative disorder, Mr. Bloom did not have the mental capacity to deliberate, to premeditate, to harbor malice, nor did Mr. Bloom have the mental capacity to meaningfully and maturely reflect upon the gravity of his contemplated acts.

The state trial court also had appointed Dr. William Vicary to examine Bloom. After the jury returned the death sentence, the state trial court appointed Vicary to determine whether Bloom was competent to be sentenced. At that time, Vicary opined Bloom was competent.

Prior to his examination of Bloom, Vicary was given only a copy of the transcript of the preliminary hearing. In a declaration submitted during the post-conviction proceedings, Vicary explains he and his staff tried to contact trial counsel prior to the examination to gain "relevant background information" on Bloom. Vicary states:

> After I informed [trial counsel's] office that the clerk of the court had contacted my office and had informed me that the court desired Mr. Bloom to be examined regardless of whether I received any information about the case, I received a copy of the pre-

> liminary hearing. [Trial counsel's] office provided me with no other documents or records or any information regarding the relationship that [trial counsel] had with his client or accounts of his client's behavior.

Vicary reviewed the information provided by Bloom's current counsel and states this information "is material that I should have been provided prior to my evaluation of Mr. Bloom in 1984." After reviewing this information, Vicary opines: "Mr. Bloom's family, social, and medical history offers compelling evidence that he suffers from serious mental disorders and brain damage." Vicary states that, had he been provided with this information at the time of his original evaluation, he would have altered his conclusions. In his most recent declaration, Vicary opines:

> At the time of the offenses for which Mr. Bloom has been convicted, sufficient data existed to show that his actions were the result of an explosive outburst that was precipitated by his deep terror and resentment of his father. Any reasonable person in a similar situation would react similarly. He had no plan to harm his stepmother or stepsister.

Also, during the post-conviction proceedings, Dr. Dale Watson, a psychologist, evaluated Bloom with a comprehensive neuropsychological test battery. Watson describes Bloom's abnormal behavior and opines: "The neuropsychological battery gave *striking, consistent and clear* evidence of cognitive sensori-motor deficits, brain dysfunction and brain damage." (Emphasis in original). He further opines "this brain damage is long-standing and pre-dates the instant offenses."

Finally, Esther Horney, a social worker, submitted a declaration during the post-conviction proceedings. Horney worked with Bloom when he was awaiting trial. Based on Bloom's

"erratic behavior," Horney believed Bloom had been subject to "severe trauma." Horney states she became aware of Bloom's "clinical mental instability" after the first few sessions. She states that on "several occasions . . . [Bloom] had incredibly intense outbursts. . . . He lost control of his body, became contorted, and screamed at the top of his lungs." Horney tried to get psychiatric help or a psychiatric evaluation to no avail. She also attempted to contact Bloom's trial counsel but was unable to. She states:

> I was appalled by [trial counsel's] behavior in this case. Soon after my first visit with [Bloom], I began to try to get in touch with [trial counsel] to inform him about [Bloom's] mental problems. I continued to try to contact [trial counsel] on a weekly basis until I retired.

C. *Analysis*

[1] The complete lack of effort by Bloom's trial counsel to obtain a psychiatric expert until days before trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance. Counsel left the responsibility of obtaining and preparing this key witness to a third-year law student who, due to counsel's lack of diligence, had no idea what defense theory counsel intended to pursue. Because counsel did not acquire the services of this key witness until days before trial, a hurried and inaccurate report resulted. Presenting the witness at trial was a disaster. "Describing [counsel's] conduct as 'strategic' strips that term of all substance." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994).

The district court found that the defense expert, Dr. Kling, had not requested any background information on Bloom and determined that, in the absence of a request, counsel was under no obligation to provide the expert with background material.

[2] It is true that counsel does not have a duty "to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert . . . ." *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995), *cert. denied*, 488 U.S. 900 (1996). The record, however, does not support the district court's finding that Kling did not request background information on Bloom.

For its finding, the district court relied on the testimony of Bloom's counsel. During the evidentiary hearing, counsel consistently responded that he could not recall details about his representation of Bloom. When asked whether Kling had requested any materials, counsel responded, "I can't remember." Counsel did not testify that Kling did not request information.

[3] Rather than supporting a finding that Kling did not request information, the testimony of Bloom's trial counsel supports a finding that such a request was made. When asked during the evidentiary hearing whether his "office" provided Kling with any materials prior to Kling's first examination, counsel responded that he believed a first-year law student[2] who was working in his office gave Kling some documents. During his deposition, counsel also testified:

> Q: When Doctor Kling received his order appointing him to examine Bloom, did he ask for some specific materials?
>
> A: I think he asked for prelim., some preliminary materials, and I can't recall what it was, sir. . . .
>
> Q: At that time did he ask you for that materials that he —

[2]This was a law student other than the third-year student, Drury.

A: I can't recall.

Q: At some point he conveyed to you a desire to have some certain materials?

A: That's correct.

Kling and Drury, the law student who drafted the appointment order, testified that Kling requested background information. Drury testified Kling told her he "wanted a copy of the preliminary hearing, he wanted a copy of the police report, and he wanted a copy of all relevant data, psychiatric and social." A copy of a note written by Drury after this conversation confirms that Kling asked for "relevant data (psychiatric & social)." Kling testified that he requested "[n]europsychological tests" and "any additional information that might be available from the social history, family history, medical history."

[4] The district court's finding that Kling did not request any information or documents is clearly erroneous. Kling requested information and a number of relevant documents, all of which were available and could have been provided, but were not. Bloom's trial counsel either had significant evidence relating to Bloom's mental state at the time of the murders, or he easily could have obtained that evidence. He had evidence that Bloom had suffered systematic abuse from childhood. He easily could have obtained the Naham report which stated Bloom was in need of inpatient psychiatric care. That report was prepared only months before the murders. Further, trial counsel never consulted Bloom's jail medical records, which were readily available. These records indicated Bloom had attempted suicide and was suffering from hallucinations.

[5] We recognize that counsel should not be faulted for failing " 'to track down every record that might possibly relate to [the defendant's] mental health.' " *Hendricks*, 70 F.3d at 1038

(quoting *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990)). However, when the defense's only expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert's flawed testimony at trial, counsel's performance is deficient.

[6] Trial counsel's deficient performance prejudiced Bloom during the trial phase of his case. Prejudice in this context is prejudice which "undermine[s] confidence in the outcome" of the trial. *See Strickland*, 466 U.S. at 694.

[7] Counsel's theory of defense rested, at least in part, on a psychiatric defense. Indeed, during closing argument, trial counsel emphasized to the jury that Bloom suffered from a mental defect. Even the third-year law student knew the defense needed a psychiatric expert witness. That witness was to be Dr. Kling. As a result of trial counsel's woefully deficient performance, however, Dr. Kling was not provided with sufficient information and, as a result, his testimony not only failed to help the defense, it significantly hindered it. Kling's report (which he now acknowledges was inaccurate) permitted the prosecution to turn Kling's trial testimony against Bloom, and it gave the prosecution the ammunition it needed to secure guilty verdicts of first degree murder with special circumstances on all three counts.

The state contends that given the fanciful story Bloom told, and to which he testified at trial, evidence of Bloom's mental capacity would have undercut the theory of defense his trial counsel was stuck with. Thus, trial counsel's failure to provide his expert, Dr. Kling, with available relevant information made no difference because at best Dr. Kling would have testified to Bloom's lack of mental capacity which would have suggested to the jury that Bloom's testimony was not credible. The district court accepted this argument. We reject it.

Although trial counsel presented the defense which Bloom apparently wanted, and to which he testified at trial, trial

counsel put in issue Bloom's mental capacity to premeditate, to intend to kill, and to act with malice. Trial counsel did this through the testimony of the defense expert, Dr. Kling. Once counsel presented that expert testimony, the case then focused on Bloom's mental state at the time of the murders. Kling provided this focus. What evolved was expert testimony based on Kling's ill-prepared report which the prosecution was then able to use against Bloom.

[8] We are satisfied that had it not been for the deficient performance of Bloom's trial counsel, there is a "reasonable probability" that the verdicts "would have been different." *See id.* Bloom has demonstrated he received ineffective assistance of trial counsel to his prejudice in violation of the Sixth Amendment.

IV

CONCLUSION

Because we reverse on the ground of constitutionally ineffective assistance of trial counsel, we do not reach the merits of Bloom's other arguments.

We reverse the district court's denial of Bloom's habeas petition and remand this case to the district court with instructions to grant the writ unless the State retries Bloom within a reasonable time.

REVERSED AND REMANDED.

APPENDIX B

Robert Maurice BLOOM, Petitioner

v.

Daniel VASQUEZ, Warden, and Attorney General of the State of California, Respondent

No. CV 90-2581-JSL

United States District Court, C.D. California

December 7, 1993, Decided
December 7, 1993, Filed; December 8, 1993, Entered

OPINION: CORRECTED ORDER AND OPINION ON PETITION FOR WRIT OF HABEAS CORPUS

LETTS, District Judge

I. INTRODUCTION

On March 23, 1992, petitioner, Robert Maurice Bloom, Jr., filed a second amended petition for writ of habeas corpus.[1] In his petition, Bloom challenges his 1983 Los Angeles County convictions of three counts of first-degree murder and his subsequent death sentence.

---

1. Bloom filed his initial petition on May 22, 1990. After conducting an investigation, Bloom filed an amended petition on February 25, 1991. The first amended petition contained claims that had not been exhausted in state court. The Court held the federal proceedings in abeyance while Bloom returned to state court to exhaust his claims. After exhausting his claims, Bloom filed his second amended petition.

Bloom raises five general claims of constitutional error: (1) insufficiency of the evidence of deliberation and premeditation; (2) ineffective assistance of counsel; (3) unfair trial due to the admission of unreliable information and inadequate jury instructions; (4) invalid waiver of right to counsel at the penalty phase; and (5) jury misconduct during the penalty phase.

Before ruling on the merits of this case, the court reviewed in excess of 3200 pages of trial transcripts, conducted a four-day evidentiary hearing focusing on claims one and four above, reviewed hundreds of exhibits, and carefully considered all of the pleadings and responsive documents filed by both parties.

As discussed in detail below, the court finds that Bloom's constitutional rights were not violated at either the guilt or the penalty phase. Accordingly, Bloom's petition for writ of habeas corpus is DENIED.

II. STATEMENT OF THE CASE

The pivotal facts of the case, as drawn from the trial transcripts, were as follows:

Bloom's father, stepmother, and eight year-old stepsister were killed in the early morning hours of April 22, 1982. All three victims died of rifle shot wounds. Two neighbors saw Bloom leave his father's house followed by his father. They saw Bloom shoot his father, with a rifle, outside the house and then go inside. One of the two witnesses heard shots coming from inside the house soon thereafter. Both witnesses saw Bloom leave the house and drive away. At the time of his arrest shortly after the murders, Bloom was found walking near his girlfriend's house with blood on his hands and shoes.

The prosecution's interpretation of these events was very simple. It urged that Bloom carried the rifle to the house with the intention of killing his father, had done

so, and then had killed his stepmother and stepsister who had witnessed the shooting. The prosecution dismissed as unwarranted any inference that Bloom had abandoned his preexisting intent to kill when he left his father's house initially. It urged, in any event, that the evidence as to what occurred after the two met outside the house was sufficient to show premeditation.

Bloom's version differed. He contended that before the occurrence of any of the events about which the neighbors testified, his father already had shot his stepmother. Bloom testified that the killing of his father and his stepsister were precipitated by the earlier shooting of his stepmother.

This testimony was the keystone of Bloom's defense. Virtually every decision made by counsel, both as to trial strategy and tactics was governed by Bloom's testimony. Bloom vigorously contends here that he should not have been permitted to give this testimony at all, but rather that he should have been induced to admit that he had killed all three victims and to base his defense on psychiatric testimony. For reasons given elsewhere, this court rejects this contention and proceeds from the premises that Bloom had the right to present the testimony that he offered to his counsel as true, and that his counsel had no duty to coerce or persuade Bloom not to do so.

From these premises, it is clear that Bloom's counsel, Sherwin Edelberg, had no alternative but to shape his defense so as to make Bloom's version of the events as credible as possible. Edelberg's strategy and tactics, therefore, must be judged with this in mind. Bloom's testimony denied responsibility for the shooting of his stepmother. His testimony left Edelberg with the need to explain why the killings of Bloom's father and stepsister, for which he certainly would be held responsible, did not constitute first degree murder.

Edelberg decided to rely on the defenses of heat of passion and temporary insanity. As to the former, Edelberg was faced with the choice of presenting Bloom's response to the shooting of his stepmother: (a) as a natural response that anyone else might have had under such circumstances, or (b) as a response that stemmed more from Bloom's peculiar psychological profile. Although he did not articulate it clearly at the evidentiary hearing, Edelberg demonstrably adopted the former choice. In this regard, Edelberg relied primarily on Bloom's testimony as to the shock of seeing his father, whom he hated, shoot his stepmother, whom he loved.

Edelberg, however, did undertake to bolster Bloom's testimony with the testimony of Dr. Arthur Kling, a psychiatrist who testified that Bloom suffered from schizotypal personality disorder, a condition characterized by eccentric thoughts, bizarre fantasies, and paranoid ideation. Dr. Kling explained that persons suffering from this disorder can experience transient psychotic episodes during which they can be unaware of what they are doing. He opined that Bloom could have been suffering from such a transient episode at the time of the murders.[2/]

Edelberg also introduced evidence that Bloom's stepmother had recently discovered that Bloom's father had married her with the intention of defrauding her out of her separate property.

Despite Edelberg's efforts, the jury found Bloom guilty of three counts of first degree murder.

III. INSUFFICIENCY OF THE EVIDENCE

---

2. On cross-examination, Dr. Kling acknowledged that he initially found Bloom sane and able to premeditate. Dr. Kling did not form his opinion about schizotypal personality disorder until after his second visit with Bloom.

Bloom maintains that the evidence was insufficient to support a finding of deliberation and premeditation for any of the murders and asks that his convictions on all counts be reduced from first to second-degree murder.

In reviewing an insufficiency of the evidence claim brought by a state prisoner, a federal court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) (emphasis in original). In applying this standard, the court must explicitly refer "to the substantive elements of the criminal offense as defined by state law." Id. at 324, n.16.

California Penal Code § 189 defines the mental state necessary for a first degree murder conviction as "willful, deliberate, and premeditated." To prove deliberation and premeditation, the prosecution need not prove that the defendant maturely and meaningfully reflected upon the gravity of his act. See § 189. Premeditation is not established by reference to time as much as it focuses on the level of reflection. People v. Thomas, 25 Cal. 2d 880, 900-901, 156 P.2d 7 (1945). A calculated judgment may be arrived at very quickly. Id.

The court concludes that a reasonable trier of fact could have found, beyond a reasonable doubt, that all three murders were premeditated. Bloom does not seriously contend that the evidence of his conduct in the time period shortly before the shootings was insufficient to show premeditation. This evidence included testimony that Bloom procured a rifle and practiced with it two nights before the shooting, that he also tried to acquire a handgun, and that he told his father that he was through controlling Bloom's life. That evidence was more than enough to demonstrate premeditation.

Bloom contends, however, that this evidence should be disregarded. He asserts that independent testimony, which showed that before shooting his father outside the house Bloom had entered and left the house without apparent incident, negated any inference of premeditation which might have arisen from his earlier conduct. Specifically, Bloom urges that any preexisting intent which he might have harbored before going to the house had been abandoned by the time he left without taking action.

The court disagrees. While Bloom's decision to leave the house clearly reflected the decision not to act right then, it did not clearly reflect a decision to abandon the intent ever to act at all. In the face of the other evidence, a reasonable juror need not have concluded that Bloom had abandoned all homicidal intent, simply because he left the house once before acting.[3/]

Moreover, even if one were to conclude that Bloom did abandon the premeditated intent to murder which was formed before he left the house the first time, the evidence of the methodical way Bloom went about the murder of his father, stepmother and sister was more than sufficient to show premeditation without reference to any of Bloom's prior acts.[4/]

---

3. In every instance where the Court adopts an inference that is favorable to the prosecution, it does so under the guidance of Jackson: A federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume --even if it does not appear from the record-- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. 443 U.S. at 326.

4. The evidence at trial supported a finding that Bloom premeditated the murders of his stepmother and stepsister: (1) Bloom went to his father's house with a loaded rifle in the middle of the night with no reason to believe that his stepmother and stepsister would not be there; (2) after killing his father outside, he reloaded his rifle and entered the house; (3) he inflicted injuries on his stepmother

Most importantly, perhaps, Bloom's testimony, which the jury obviously did not believe, permitted the jury to draw an inference of premeditation against him. Bloom, in his testimony, attempted to explain away damaging evidence as to premeditation by weaving an elaborate story about how he chased two prowlers, with a rifle in hand, from his girlfriend's house to a point near his father's house, abandoned the pursuit, and entered his father's house, whereupon his father obtained possession of the rifle and shot Bloom's stepmother.

Bloom's sophisticated attempt to refute the evidence against him, if not believed, could give rise to an inference that Bloom was conscious of his own guilt[5] and that the evidence against him was true. Bloom's decision to tell that story was a significant gamble: if the jury believed that Bloom did not shoot his stepmother, he had a chance to go free or at least not be convicted of first degree murder; if the jury did not believe him, he certainly would be convicted of first degree murder on all three counts. Bloom lost this gamble. Moreover, Bloom produced independent evidence of premeditation by fabricating a story designed to refute the prosecution's evidence of premeditation.

There was sufficient evidence to convict Bloom of first degree murder on all three counts.

IV. SIXTH AMENDMENT VIOLATIONS

---

and stepsister, evidencing an intent to kill; and (4) after the murders he left in his stepmother's car, which he later abandoned, disposed of the rifle in such a manner that it has never been found, and was on his way back to his girlfriend's house when he was arrested.

5. 2 Edward J. Devitt, Charles B. Blackmar, Michael A. Wolff and Kevin F. O'Malley, Federal Jury Practice and Instructions: Civil and Criminal § 14.06 (4th ed. 1992); 1 Paul G. Breckenridge, Jr., Aurelio Munoz, California Jury Instructions: Criminal 27 (5th ed. 1988).

AT THE GUILT PHASE

Bloom asserts that his Sixth Amendment rights were repeatedly violated at the guilt phase of his trial. Most of his claims allege ineffective assistance of counsel. Each claim is addressed below.

A. Standard for Reviewing Ineffective Assistance of Counsel Claims

In analyzing whether Edelberg's counsel was constitutionally ineffective, the court considers two issues: First, whether counsel's performance was deficient, falling below an objective standard of reasonableness viewed from the time of representation; and second, whether that deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Bloom bears the burden of satisfying both of these requirements. Id.

[3] In gauging the reasonableness of an attorney's investigation, the information supplied by the defendant is especially relevant. Id. at 691. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id.

[4] Edelberg's strategic and tactical decisions were governed by the story told by Bloom. Bloom's challenges stem from his assertion that Edelberg should have ignored his account of the murders and argued a different defense. As discussed below, this assertion is invalid. Edelberg was required to bolster Bloom's basic story as best he could, but was not required to force Bloom to recant and admit killing his stepmother. Thus, Bloom's constitutional challenges, which are premised on the incorrect notion that Edelberg should have disbelieved Bloom's story and presented a different defense, necessarily fail.

B. Improper Strategic

Bloom faults Edelberg for a number of errors and omissions relating to strategic pre-trial decisions. Bloom maintains that the defenses of heat of passion and temporary insanity were ineffectively prepared and presented and that the innocence defense was incompetently conceived and was contrary to the evidence presented by the prosecution.[6] To support these arguments, Bloom highlights specific examples of Edelberg's shortcomings.

(1) Presenting Ineffective Defenses

In examining Edelberg's preparation and presentation of the defenses, the court starts with the premise that an attorney's actions are shaped by his client's strategic choices. See Strickland, 466 U.S. at 691. Here, despite some initial variations in describing the night of the murders, Bloom settled fairly quickly on the story he told at trial. [HT 1/185-186.][7] In addition, Bloom was adamant, almost from the start, that he was going to testify at trial to the story he was telling Edelberg. [HT 1/194-195.] Edelberg found Bloom to be logical, coherent, and rational; therefore, he had no

---

6. Bloom also argues that Edelberg should have presented a psychiatric defense focused on lack of premeditation. Indeed, many of Bloom's exhibits support this theory. In his pre-hearing papers, however, Bloom correctly retreats from this position. Bloom concedes that his state of mind at the time of the murders would be relevant only to demonstrate prejudice in the event the court was to find that Edelberg's representation was constitutionally deficient.

7. "HT" refers to the evidentiary hearing transcripts. "RT," cited later, denotes the reporter's transcripts of the trial. The number to the left of the slash refers to the volume number. The number to the right of the slash indicates the page number.

reason to question the underpinnings of Bloom's story any further than necessary to achieve a cogent and presentable defense. [HT 1/186-187, 198-199.][8]

Given that Edelberg found Bloom to be competent, this court would consider it to have been professionally inappropriate for Edelberg to attempt to disprove Bloom's story or attempt to convince Bloom that a different story or defense would be better. Indeed, the court finds the contention alarming that Edelberg had a constitutional duty to get Bloom to alter the story that he asserted to be true.

Even truthful explanations of innocence may be highly implausible, but defendants have the right to make such explanations to the jury. It risks serious undermining of this right to suggest that the defendant's right to speak may be exercised only after the defendant's own lawyer has exercised a constitutional duty to go to maximum lengths to make the defendant see that he will not be believed.

This was not a case in which it behooved Edelberg to demonstrate to Bloom that his testimony was objectively incredible for the purpose of inducing him to waive his right to testify. If Bloom did not testify, he stood no chance of acquittal. Furthermore, despite some initial variations, Bloom settled on the story which he told at trial relatively early in the proceedings and he was determined to testify from that point forward.

So long as a criminal defense lawyer does not knowingly suborn perjury, and Edelberg never believed that he was suborning perjury by allowing Bloom to testify as he did, he has the duty to help his client present the best available defense consistent with the version of

---

8. At the evidentiary hearing, Edelberg ably defended the choices he made and the actions he took while representing Bloom. The Court found that Edelberg's answers and demeanor on the witness stand lent much credibility to his testimony.

events that his client asserts to be true. [HT 1/191-192.] While no doubt the lawyer also has the duty to point out how cross-examination may highlight the least credible aspects of his client's testimony, the thought that the lawyer must do so to the point of persuading the client that even his lawyer does not believe him goes much too far.[9]

Indeed, Edelberg's belief in Bloom's story grew as he found circumstantial evidence to corroborate it. [HT 1/202-203.] Edelberg's investigator found evidence that Bloom's father married Bloom's stepmother as part of a fraud to acquire her property. In addition, Edelberg was able to document Bloom's father's history of violence against Bloom and two former wives. Edelberg recognized that Bloom's story had its flaws -- most notably its inconsistencies with one neighbor's testimony that Bloom's stepmother screamed after Bloom's father was shot and the evidence that there were no blood stains on his stepmother's hands and near her bedroom. Nevertheless, Edelberg believed that Bloom's story might be true. He could not force Bloom to change his testimony simply because Bloom told an unlikely story.

The knowledge that Bloom would testify and that his testimony would implicate his father with his stepmother's murder shaped Edelberg's choices in defending the other two murders. Psychiatric evidence designed to portray Bloom as mentally disturbed prior to the murders would have destroyed Bloom's credibility. Presenting strong psychiatric evidence of insanity would leave Edelberg in the position of relying on Bloom's version of the murders while simultaneously attacking Bloom's competency to testify. Instead, Edelberg focused

---

9. This is particularly true in a case like this where attorney-client relations were admittedly difficult and fragile. The fact is, however, that Edelberg did believe Bloom's testimony. [HT 1/239-240.]

on a heat of passion defense. This defense required nothing more than Bloom's testimony, bolstered by the kind of psychiatric evidence offered by Dr. Kling to the effect that Bloom was even more vulnerable than others in his response to the horror of seeing his father shoot his stepmother.

Finally, Edelberg presented the only available defense to stepsister's murder: That Bloom was temporarily insane. Bloom stated that he did not remember killing his stepsister. Dr. Kling testified that Bloom may have experienced a temporary amnesic state brought on by the trauma of shooting his father, during which time he lost touch with reality. Thus, temporary insanity was a credible defense to the stepsister's murder.

The court does not dispute Bloom's contention that Bloom's defense could have been presented better, or that Edelberg could have presented different mental state defenses. In raising ineffective assistance of counsel claims, habeas petitioners often assert that a different trial strategy would have produced more favorable results. See Lockhart v. Fretwell, 122 L. Ed. 2d 180, 190-191, 113 S. Ct. 838 (1993). This case is no different. The ability to fashion a different and perhaps better defense years later is irrelevant if the defense presented was a reasonable tactical decision. Edelberg made reasonable strategic choices based on Bloom's anticipated testimony and on the information made available to him. The Constitution requires nothing more.

(2) Inadequate Time to Prepare

Bloom argues that Edelberg did not spend enough hours meeting with him to prepare adequately for trial. This argument depends on Bloom's faulty premise that Edelberg should have forced Bloom to change his story and pursued an insanity defense. Once Edelberg

learned Bloom's relatively simple story, he needed to find extrinsic evidence to support it.

Edelberg's time sheets show that he spent an estimated sixty-one hours visiting Bloom in jail. Given Edelberg's trial strategy, this appears reasonable. Bloom's story was not factually complex. During those sixty-one hours, Edelberg obtained a version of the events that fairly squared with the evidence, came to appreciate that Bloom was adamant about testifying, and learned that Bloom would not accept a plea that would give him life without the possibility of parole.

[5, 6] The total number of hours is irrelevant in any event since brevity of contact between defendant and counsel, without more, will not sustain an ineffective assistance of counsel claim. See Murray v. Maggio, 736 F.2d 279, 282 (5th Cir. 1984). Bloom has not demonstrated that Edelberg's failure to expend sufficient time and energy impaired the defense. See United States v. Taylor, 802 F.2d 1108, 1119 (9th Cir. 1986), cert. denied, 479 U.S. 1094, 94 L. Ed. 2d 164, 107 S. Ct. 1309 (1987).

(3) Delayed Psychiatric Examination

[7] Edelberg explained that he waited to employ Dr. Kling until ten months after receiving approval from the trial court, hoping to get "something a bit more objective out of the client," something "that would tend to show irrationality." [HT 1/208.] Prior to actually engaging Dr. Kling, Edelberg had not observed any obvious manifestations of mental disease or defect in Bloom. The court is satisfied that the delay in hiring Dr. Kling was a reasonable tactical decision in light of the defense theory of the case. Bloom suffered no prejudice as a result.

(4) Not consulting with Dr. Kling Before He wrote His first Report

[8] Edelberg testified that he prefers to have an expert examine the client prior to his conferring with the expert to prevent tainting or influencing the expert. [HT 1/139-140.] While not necessarily ideal, the court finds this to be a reasonable tactical choice given the defense theory.

(5) Failing to Provide Dr. Kling with Proper Guidance

Bloom contends that had Edelberg discussed the case more thoroughly with Dr. Kling, Dr. Kling would have been able to support a psychiatric defense based predominantly on the abuse of Bloom by his father. Bloom also faults Edelberg for failing to provide Dr. Kling with the myriad of documents and reports on Bloom's background compiled by his current counsel. See Petitioner's Exhibits 19-110, 121. Apparently, Edelberg never obtained Bloom's prior psychiatric reports and other documents that might have supported a psychiatric defense, nor did Dr. Kling seek such documents. [HT 1/211-212.]

[9] In the absence of a specific request, an attorney is not responsible for gathering background material that might be helpful to a psychiatrist evaluating his client. Accordingly, an attorney cannot be found incompetent for failing to gather such documents. See Card v. Dugger, 911 F.2d 1494, 1511-1512 (11th Cir. 1990); Smith v. Dixon, 766 F. Supp. 1370, 1390 (E.D.N.C. 1991), aff'd, 996 F.2d 667, 679 (4th Cir. 1993).

[10] In addition, Bloom's assertions do not reflect the reality of Edelberg's approach. Edelberg, for the reasons discussed above, chose to present defenses based on innocence, heat of passion and temporary insanity. Dr.

Kling's testimony supported these defenses. Had Edelberg opted for a psychiatric-based lack of premeditation defense, then Bloom's contentions might have some merit. Edelberg, however, was not ineffective for failing to provide Dr. Kling with information that would have supported a defense not presented.

As discussed below, Edelberg gave Dr. Kling sufficient guidance and information. Accordingly, Bloom's challenge must fail.[10]

Both respondent's expert psychiatrist, Dr. John Stalberg, and the court's appointed psychiatrist, Dr. Mark Mills,[11] opined that the information Dr. Kling received

---

10. Prior to his initial evaluation of Bloom, Dr. Kling received from Edelberg's office: Dr. Kling's order of appointment and a series of questions he was to address, a copy of the police report, a transcript of the preliminary hearing, two of Bloom's school assignments, a nine page letter to a Los Angeles Superior Court Judge from Bloom's mother detailing background information on Bloom, a three page list of odd things that Bloom's mother had observed Bloom doing, a fourteen page "autobiography" of Bloom's mother, copies of fourteen letters and telegrams that Bloom's father sent to Bloom while Bloom was in the Navy, Bloom's certificate of scholastic award from his high school's home economics department, Bloom's honorable discharge from the Navy, and a recent neurologist's report, including an EEG report. See Respondent's Exhibit 215(a-j).

11. At the evidentiary hearing, the Court appointed Dr. Mills, a psychiatrist and juris doctorate, to be the Court's own expert in assessing the psychiatric issues present in the case. Dr. Mills reviewed the evidence admitted at the hearing, heard the psychiatric testimony, and then offered his views on the psychiatric issues.

Originally, the Court expected Dr. Stalberg and Bloom's expert psychiatrist, Dr. Philip Wolfson, to offer widely disparate opinions. The Court's primary purpose in appointing Dr. Mills was to narrow this gap. Dr. Mills performed this function admirably by meeting with Drs. Kling, Wolfson and Stalberg in advance of the hearing. This meeting resulted in the narrowing of the disputed psychiatric issues.

was greater than most forensic psychiatrists receive before offering their opinions.[12/] Drs. Stalberg and Mills further stated that previous psychiatric evaluations and other mental health background documents would have bolstered Dr. Kling's testimony, but would not have significantly altered his views.

The court finds that while Edelberg could have provided Dr. Kling with better instruction on his theory of the defense, Dr. Kling was adequately prepared to assist Edelberg. Bloom, therefore, was not deprived of any constitutional right.

(6) Failing to Offer Other Psychiatric Testimony

Based on the defenses presented, Edelberg had no good reason to present more or different psychiatric opinions. Dr. Kling's opinions supported Edelberg's defense. [HT 1/150-151.] To the extent Bloom is suggesting that Edelberg should have used another psychiatrist because of Dr. Kling's initial report, the court rejects that notion. Edelberg explained that in his professional opinion, Dr. Kling, with his excellent reputation, would be a better witness despite his change of opinion following a second evaluation, than would another psychiatrist. [HT 1/147-152.] The court finds this to be a reasonable strategic choice.

Dr. Mills' psychiatric opinion also confirmed and strengthened the Court's own views. His testimony was particularly useful in highlighting the relative credibility of the psychiatrists who testified at the hearing.

12. Dr. Wolfson disagreed. Significantly, both Dr. Stalberg and Dr. Mills are board-certified in forensic psychiatry and have had extensive involvement with court appointments in criminal cases. Dr. Wolfson, however, lacks certification in both forensic and general psychiatry and has participated in only five criminal cases.

C. Improper Tactical Decisions

Bloom also criticizes Edelberg for making several improper tactical decisions during trial.

(1) Dr. Kling's First Report

[11] Bloom argues that Edelberg should have elicited the contents of Dr. Kling's first report on direct examination, or at least should have objected to the admission of the report on cross-examination. Bloom has failed to rebut the presumption that Edelberg's decision was a reasonable tactical choice.

Trial lawyers often confront hard choices between defusing negative information by eliciting it on direct examination rather than allowing it to be raised on cross-examination and addressed on redirect examination. The choice of one over the other, even if wrong, has no constitutional dignity.

Moreover, the choice was not clearly wrong. Dr. Kling's first report primarily concerned Bloom's mental capacity at the time of the murders. Dr. Kling's statements, while not helpful to the defense, were not inconsistent with the defenses presented. Bloom's denial of the killing of his stepmother, and Edelberg's decision to emphasize the events of that night in his heat of passion defense are based on the presumption that but for these events, Bloom would have been capable of premeditation.

Bloom also argues that, even if Edelberg's failure to elicit the substance of Dr. Kling's report on direct examination was not constitutional error, Edelberg should have objected to its discussion on cross-examination because Dr. Kling's opinions were inadmissible under California Penal Code § 28.[13] Even if the testimony was

---

13. California Penal Code § 28 forbids the admission of evidence of mental disease, defect or disorder to show or negate the capacity

inadmissible, "an attorney's failure to object to the admission of inadmissible evidence is not necessarily ineffective." Morris v. California, 966 F.2d 448, 456 (9th Cir.), cert. denied, 121 L. Ed. 2d 57, 113 S. Ct. 96 (1992). Whether or not the evidence was admissible, Bloom has failed to overcome the presumption that Edelberg's lack of objection was a sound trial tactic.[14/]

The court need not determine the actual explanation for Edelberg's failure to object because Edelberg's failure to do so fell within the range of reasonable representation. Id. Furthermore, as discussed above, Dr. Kling's cross-examination testimony, while not helpful to the defense, was not prejudicial.[15/] The fact that Bloom had the mental capacity to commit murder, to deliberate and premeditate, to harbor malice, and to meaningfully and maturely reflect upon the gravity of his acts does not mean that Bloom's father did not kill his wife, that Bloom did not kill his father in the heat of passion, and that Bloom did not kill his stepsister while in a temporary amnesic state.

(2) Failure to Present Evidence Linking Child Abuse and Parricide

[12] Bloom faults Edelberg for failing to research the relationship between child abuse and parricide. Had Edelberg done so, Bloom submits, he would have been

---

to form a specific mental state.

14. Although Bloom called Edelberg as a witness at the evidentiary hearing, he did not question him about his decision not to object.

15. Dr. Wolfson, Bloom's expert, agreed that the issue of whether someone has the mental capacity to form a specific mental state is quite different than the issue of whether someone actually formed a particular mental state. [HT 2/310.]

able to explain how years of abuse caused Bloom to explode in a burst of violence that killed not only his father, the abuser, but the other family members who were present. Once again, this contention proceeds from the premise that Bloom should have testified differently.

In any event, the court finds no relevant support for this claim. Bloom offers a declaration by Paul Mones, an attorney specializing in the defense of children accused of parricide. While Mones writes at length about his work on parricide cases, his views are not germane to this case, which was tried in 1983, since Mones did not start working on parricide cases until 1986, and it is his post-1986 work which forms the basis for his current views on the proper way to try parricide cases.[16]

Despite the three-year gap between Bloom's trial and the development of parricide profiles, Mones postulates his theory of the defense of parricide cases, points out where Edelberg deviated, and concludes that Edelberg was ineffective. The court will not give constitutional dignity to defense strategies followed by particular attorneys. Indeed, the court has serious reservations about any strategy that purports to be applicable across a span of cases. The uniqueness of parricide cases and the uniqueness of defense attorneys defy an across-the-board application of trial strategy. Edelberg did not deprive Bloom of any constitutional right

---

16. Mones' suggests in his declaration that there were numerous sources of information on parricide available at the time Edelberg represented Bloom. However, judging by the titles of the twenty cited articles, only a few seem relevant to the defense of Bloom's case. Moreover, the articles are from medical and sociological references, not from legal sources. Lawyers are responsible for knowing developments in other disciplines only to the extent that such developments can be found in the legal literature and perhaps in the popular press. Edelberg will not be held responsible for failing to find all existing information on all possible theories.

by failing to retain a parricide expert or to present a parricide defense.

(3) Failure to Object to Statements Made During Closing Argument

Bloom argues that Edelberg should have objected to two statements made by the prosecutor during closing argument at the guilt phase: (1) the prosecutor opined that when the defense does not have anything going for it, it will often create diversions such as blaming someone else or claiming a blackout. [RT 39/4651-4652]; (2) the prosecutor described Bloom as the "evil incarnate" and compared him to Fu Manchu. [RT 41/4843.][17]

[13, 14] Absent egregious misstatements, a defense attorney's failure to object during closing argument will not fall below acceptable parameters of attorney conduct. U.S. v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993); U.S. v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991). Because the prosecutor's comments cannot fairly be described as "egregious," Edelberg's failure to object was neither unreasonable, nor prejudicial.

(4) Failure to Request Instruction on Abandonment of Premeditation

[15] Bloom contends that his two retreats from his father's house show that he abandoned his intent to kill his father

---

17. In his direct appeal, Bloom argued that the above two statements constituted prosecutorial misconduct. The California Supreme Court rejected that argument because counsel failed to object or seek an admonition. People v. Bloom, 48 Cal. 3d 1194, 1213, 259 Cal. Rptr. 669, 774 P.2d 698 (1989). Bloom has now reformulated this argument as an ineffective assistance of counsel claim.

and therefore Edelberg should have requested a jury instruction that a prior intent to kill will not support premeditation if the intent is abandoned prior to the execution of the plan. Bloom's claim is without merit.

The trial court instructed the jury on the elements of first degree murder. [RT 39/4544-4546.] The instruction included a definition of "premeditation" and a caution that the intent to kill "must have been formed upon pre-existing reflection and not under a sudden heat of passion . . . ." [RT 39/4544.] Based on these instructions, the California Supreme Court concluded that "no reasonable juror would have believed that a premeditated finding could be made despite an abandonment of premeditated intent prior to the slaying." People v. Bloom, 48 Cal. 3d 1194, 1211-1212, 259 Cal. Rptr. 669, 774 P.2d 698 (1989). This court agrees. While an abandonment instruction might have highlighted the point, Edelberg's failure to request the instruction does not rise to the level of professional incompetence.

D. Denial of the Right to the Effective Assistance of a Psychiatric Expert

[16] Citing Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985), Bloom asserts that Dr. Kling's ineffectiveness violated his constitutional right to a competent psychiatric evaluation. Bloom claims Dr. Kling failed to obtain an accurate medical and social history and failed to consult with sources other than Bloom. This attack on Dr. Kling's performance cannot survive either legal or factual scrutiny.

Ake holds that when a defendant's sanity at the time of the offense will be a factor at trial, the state must provide an indigent defendant with psychiatric assistance. Id. at 74. The assistance includes the services of a competent psychiatrist who will conduct an examination

and assist counsel in evaluating, preparing and presenting the defense. Id. at 83.

Ake does not provide a legal basis for challenging in a federal habeas corpus proceeding the competency of the defense psychiatrist used at trial. Harris v. Vasquez, 949 F.2d 1497, 1517-1518 (9th Cir. 1991). Habeas corpus is available to ensure the accuracy and fairness of criminal trials. Id. at 1520. Allowing a defendant to raise a constitutional challenge to his death sentence a decade later by presenting new psychiatric opinions does not further the goals of fairness and accuracy. Id. Accordingly, federal habeas will not serve as a "psychiatric medical malpractice review." Id.

The law requires only that a competent attorney select a competent psychiatrist. There is no question that Dr. Kling was extremely well qualified to serve as an expert for Bloom. At the time of his appointment, Dr. Kling was Vice Chairman of the Department of psychiatry at U.C.L.A., Chief of the Psychiatry Service at the Sepulveda V.A. Medical Center and a member of the forensic panel for the Los Angeles County Superior Court. [RT 37/4376; HT 2/398.] Dr. Kling had close to one hundred publications focusing primarily on the relationship between brain function and behavior and had ten years of experience as a psychiatric consultant for the New Jersey Department of Corrections. [RT 37/4377.] Dr. Kling also had testified in one or two previous criminal cases, including one murder case. [HT 2/379.] In short, Dr. Kling was well-credentialed and experienced.

Once an attorney has selected a competent psychiatrist, the attorney has met his constitutional obligations vis-a-vis obtaining psychiatric assistance. The Constitution does not recognize a right to the effective assistance of a psychiatrist or the effective assistance of a witness.[18] Harris, 949 F.2d at 1517-1518. Bloom's claim

---

18. Even if a "competency of the psychiatrist review" was

that he received ineffective assistance of a psychiatrist must be denied.

E. Problems With Bloom's First Attorney

Bloom asserts that his original attorney, Howard Beckler, withdrew from the case after the preliminary hearing because he could not cope with Bloom's confession that he killed all three victims. After Beckler withdrew, he did not help Edelberg to establish a relationship with Bloom and failed to provide Edelberg with all of the relevant information he had gathered during his representation. Bloom claims that Beckler's withdrawal caused him to feel abandoned and unable to confide in his new counsel.

Relying heavily on Beckler's testimony, the court finds no constitutional deficiency in Beckler's performance, nor any constitutional error in Edelberg's representation as affected by Beckler.

Beckler testified that, for financial reasons, Bloom's mother retained him only through the preliminary hearing. Bloom presented no evidence to support his claim that Beckler withdrew after the preliminary hearing due to Bloom's graphic confession. Beckler further explained that he never discussed Bloom's case with Edelberg or provided Edelberg with any information because he believed he would have been constrained from releasing any information without a written waiver of the attorney-client privilege from Bloom. The court agrees with Beckler's understanding of the attorney-client privilege.[19/] Bloom's claim on this ground is denied.

---

appropriate, Bloom has not established that Dr. Kling was incompetent. To the contrary, Drs. Mills and Stalberg found Dr. Kling's work to be quite competent. [HT 3/585, 652-653, 664.]

19. The Court further notes that Bloom, after having confessed

F. Conclusion

Bloom has failed to establish that Edelberg's actions, either individually or collectively, violated any aspect of Bloom's Sixth Amendment rights.

V. UNFAIR TRIAL

Bloom contends that his trial was fundamentally unfair because: (a) Dr. Kling's first report should not have been admitted; and (b) the jury should have been instructed that evidence of mitigation presented in the guilt phase could be considered at the penalty phase. These two errors, Bloom argues, require reversal of the jury's decision to prevent any risk that the jury returned a death verdict in spite of factors calling for a lesser penalty.

A. Dr. Kling's Report

Bloom contends that the prosecutor's use of Dr. Kling's first report rendered his convictions and sentence unreliable in violation of the Eighth and Fourteenth Amendments because the admission violated California law and was based on inadequate and incorrect information. To support this claim, Bloom cites a number of cases discussing the need for reliability in information presented to death penalty juries. However, none of these cases contain a reliability question of the nature posed by Bloom.

[17] Any contention that the statement was improperly admitted under California law must fail since federal habeas relief is not available for errors of statelaw, but is confined to determining whether a violation of the

---

to Beckler, would have no rational reason for wanting Edelberg to have Beckler's file information since Bloom changed his story about the murders by the time Edelberg began representing him.

Constitution, laws, or treaties of the United States has occurred. Estelle v. McGuire, 116 L. Ed. 2d385, 112 S. Ct. 475, 480 (1991).

Bloom's argument that his trial was fundamentally unfair must also fail. Bloom cannot demonstrate either factually or legally that the admission of Dr. Kling's report produced an unfair trial. For Bloom to prevail on this claim, he must demonstrate that Dr. Kling's first report was erroneous and that the admission of the "inaccurate" report rendered his trial unconstitutional. Bloom has made neither showing.

[18] Dr. Kling's based his initial report almost entirely on his interview with Bloom. See Petitioner's Exhibit 20. Bloom's present contention that the report is inaccurate and untrue rests on the proposition that what he told Dr. Kling was inaccurate and untrue. Habeas relief is not justified or required when a defendant misrepresents facts to a psychiatrist and then later attacks the psychiatrist's opinion as erroneous because the facts upon which it is based are false.

The court finds no basis for holding that the admission and consideration of Dr. Kling's report was unconstitutional.

B. Jury Instruction

[19] Bloom maintains that the trial court should have instructed the jury explicitly that mitigating evidence introduced at the guilt phase must be considered at the penalty phase. Bloom contends that, absent instruction from the court, the attorneys should have told the jury during argument that the record contains evidence of mitigation that must be considered. Instead, the prosecutor led the jury to believe that Bloom presented no evidence in mitigation. Bloom perpetuated this erroneous conclusion, by stating in his closing comments, "there ain't no mitigating circumstances."

"An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155, 52 L. Ed. 2d 203, 97 S. Ct. 1730 (1977). A review of the jury instructions given at the penalty phase of Bloom's trial leaves no doubt that the jury knew it could consider any mitigating evidence from the guilt phase. The judge instructed the jury: "In determining which penalty to impose upon the defendant, you shall considerall of the evidence which has been received during any part of the trial, including the guilt phase. You shall consider, take into account, and be guided by the following factors, if applicable: [The court then listed the 11 statutory factors to be considered in all death penalty cases]." [RT 44/5062-5063 (emphasis added).]

It cannot be said that this instruction would lead the jury to believe it could not consider guilt phase evidence for all factors, including mitigating factors. Accordingly, the omission of a more specific instruction was neither prejudicial, nor unconstitutional.

VI. PENALTY PHASE FACTS

Following Bloom's conviction on three counts of first-degree murder, the trial court granted Bloom's request to represent himself at the penalty phase. At Bloom's request, Edelberg served as co-counsel. Bloom told the court when he made his request that he was intending to seek the death penalty and would not be offering any mitigating evidence.

At the penalty phase hearing, the prosecution presented evidence that four months prior to the murders, Bloom had been arrested for pulling a gun on a woman at a Bible study meeting and attempting to steal the woman's purse. Bloom, on cross-examination, elicited testimony that he had also been a suspect in the attempted robbery of an elderly couple. A police officer who had stopped

Bloom for walking oddly down the street while carrying a BB gun testified that Bloom had threatened to shoot the officers. Bloom presented no evidence and told the jury that he deserved to die and wanted to die.

The jury returned a death sentence after less than four hours of deliberation.

VII. SIXTH AMENDMENT VIOLATIONS AT THE PENALTY PHASE

[20] Bloom argues that his waiver of his right to counsel and his motion to represent himself at the penalty phase for the purpose of seeking the death penalty were invalid and deprived him of his Sixth Amendment right to counsel. Bloom bases this claim on two arguments: (1) that his waiver was a product of the same mental illness that prompted the murders and (2) that his waiver was not knowing and intelligent because it resulted from a breakdown of his attorney-client relationship with Edelberg.

A. Bloom's Incompetency to Waive His Right to Counsel

Bloom stands before this court claiming that he was not competent to waive his right to counsel and asking for a new penalty phase to remedy a supposed constitutional violation. Bloom's only evidence in support of this claim is declarations from mental health professionals who examined Bloom ten years after he chose to represent himself at the penalty phase.[20/]

---

20. Bloom provided the Court with declarations from Dr. David Lisak, Dr. William Vicary, Dr. Donald Verin, Joni Diamond, L.C.S.W., and Dr. Dale Watson, as well as a report from Dr. Wolfson. The

The court finds the declarations unpersuasive. Dr. Kling found Bloom competent to stand trial in August, 1983. In June, 1984, six months after Bloom obtained pro per status, a jury found him competent to be sentenced. Bloom argues that competency to be sentenced cannot be compared to competency to waive counsel, relying on Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992), rev'd, 125 L. Ed. 2d 321, 113 S. Ct. 2680 (1993). As indicated, however, the United States Supreme Court recently reversed Moran, holding that the Due Process Clause does not require the standard for competency to waive the right to counsel to be higher or different than the standard for competency to stand trial. See Godinez v. Moran, 125 L. Ed. 2d 321, 334, 113 S. Ct. 2680 (1993). The court finds the two findings of Bloom's competency, framing the relevant penalty phase period, to be compelling evidence that Bloom was competent to waive counsel at the penalty phase. Even if the court did find the declarations relevant, Drs. Mills and Stalberg independently concluded that they believed Bloom to be competent, and the court finds these witnesses to be more persuasive.

In addition, the observations of those who saw Bloom in December, 1983 at the penalty phase are important indications of Bloom's competency. In this regard, the comments of the trial judge at the time of Bloom's request are quite revealing: "We have been involved in this jury selection and this jury trial since sometime late September, and in that period of time, obviously I have had ample opportunity to observe you on the record, off the record, et cetera. It is clear to me that you possess sufficient intellect to understand the proceedings, to read, to write, to address yourself to the

---

declarations of Drs. Vicary and Verin, and the declaration of Diamond were not signed until May 11, 1993, the day before the evidentiary hearing began and were not presented to respondent or the court until the first day of the hearing.

court and to the jury. It is also clear that you understand the gravity of the situation." [RT 42/4875-4876.]

Likewise, Edelberg found no reason to question Bloom's competency and concurred, albeit reluctantly, with Bloom's request to represent himself. The two people in the best position to judge Bloom's competency at the time of the penalty phase, the trial judge and Bloom's attorney, found no reason to question Bloom's competency to represent himself and to seek the death penalty.[21]

In addition, this court's review of the penalty phase transcripts did not illuminate any obvious incompetency on Bloom's part. Indeed, at some point after the penalty phase had concluded, the trial judge observed, "[Bloom] appeared before the jury and pled and pled rather eloquently for the death penalty." [RT 45/5099.] On another occasion the judge told Bloom, "you sought the death penalty and you achieved that goal. You did a wonderful job for yourself. Keep doing a wonderful job for yourself and we will let you file whatever motions you believe are appropriate." [RT 45/5109.]

Bloom has not demonstrated to this court that he was incompetent to waive counsel and perform in a co-counsel capacity. The court finds the contemporaneous opinions of Edelberg and the trial judge to be highly persuasive. In addition, the court finds it relevant that a jury found Bloom competent to be sentenced only six months after Bloom obtained co-counsel status. The trial record is replete with references to Bloom's mental state deteriorating after the penalty phase concluded. Accordingly, it would be difficult to reconcile a finding of

---

21. Six months after the penalty phase, Edelberg sought and obtained a competency hearing to assess Bloom's competency to be sentenced. From this, it can be inferred that both Edelberg and the trial judge were familiar with and capable of initiating competency proceedings.

competency after an observed deterioration of mental function with a finding of incompetency to waive counsel prior to the deterioration.

The record before this court does not support a finding that Bloom was incompetent to represent himself and to seek the death penalty.[22] Accordingly, Bloom suffered no Sixth Amendment violation by representing himself at the penalty phase.

VII. JURY MISCONDUCT

[21] Bloom argues that jury misconduct during the penalty phase deliberations requires a new penalty phase. The alleged misconduct involved the jury's consideration of erroneous law in determining the appropriate sentence. Specifically, Bloom submits that: (1) one juror told the other jurors that with a life sentence, Bloom would be eligible for parole in 7 years; (2) during deliberations several jurors opined that even with a death sentence, Bloom would never be executed; (3) one juror stated that "who knows when an execution would ever happen" and "[Bloom] will probably be 50 years old before anything happens;" (4) two jurors who initially were in favor of life without the possibility of parole ("LWOP") voted for death after a discussion among the jurors regarding the possibility of LWOP being commuted by the governor.

---

22. The record suggests that Bloom's decision to represent himself and seek a death sentence may have been a calculated decision. At the competency hearing, Dr. Richard Naham, a psychiatrist, testified that Bloom told him he sought the death penalty so his case would get to the California Supreme Court more quickly. Bloom recited the names of judges on the California Supreme Court and said that the California Supreme Court always reverses death penalty cases. [RT 47 5656-5704.]

Bloom asserts that the jurors' discussions contained extrajudicial legal information that was clearly erroneous since LWOP prisoners, unlike life prisoners, are not eligible for parole after seven years. According to Bloom, the constitutional error occurred when the jury considered evidence that was not presented in open court and which thus deprived him of his constitutional rights to counsel, to confrontation, and to cross-examination.

Bloom contends that the jurors' discussions, or more aptly speculations, about the true meaning of LWOP and the death penalty amounted to constitutional error. Bloom skates over the question of whether the jurors' statements about what occurred during deliberations are even admissible. See United States v. Maree, 934 F.2d 196, 201 (9th Cir. 1991) (admissibility of juror's statements is a threshold question).

Federal Rule of Evidence 606(b) governs the admissibility of the juror testimony to impeach a verdict:[23] "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of deliberations or to the effect of anything upon
his or any juror's minds or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter which he would be precluded from testifying be received for these
purposes."

---

23. Pursuant to Federal Rule of Evidence 1101(e), the Federal Rules of Evidence apply to habeas corpus cases brought under 28 U.S.C. § 2254.

Thus, the court begins with the proposition that it cannot consider any information obtained from the jurors unless the information concerns the receipt of extraneous prejudicial information or the presence of an outside influence.[24/]

A careful review of the juror interviews submitted by the parties reveals no evidence of any extraneous information provided to the jury or any outside influence exerted on the jury. Accordingly, the court's inquiry must end here. See e.g. Silagy v. Peters, 905 F.2d 986, 1008-1009 (7th Cir. 1990), cert. denied, 498 U.S. 1110, 112 L. Ed. 2d 1106, 111 S. Ct. 1024 (1991); Fulghum v. Ford, 850 F.2d 1529, 1535 (11th Cir. 1988), cert. denied, 488 U.S. 1013, 102 L. Ed. 2d 793, 109 S. Ct. 802 (1989).

In sum, neither Bloom's allegations, nor the reports of the juror interviews, raise anything other than intra-jury matters. Rule 606(b) and related case law prohibit this court from considering the type of information upon which Bloom bases his claim. Accordingly, habeas relief on this issue is denied.[25/]

---

24. The cases upon which Bloom relies involve information imparted by a third party or obtained through an outside reference. No such allegation has been made in this case. See Parker v. Gladden, 385 U.S. 363, 17 L. Ed. 2d 420, 87 S. Ct. 468 (1966) (bailiff told the deliberating jury that defendant was a "wicked fellow" who was guilty and told another juror that the Supreme Court would correct any improper guilty verdict); Gibson v. Clanon, 633 F.2d 851 (9th Cir 1980) (one juror consulted an encyclopedia and another juror looked at a medical dictionary and both jurors shared the information with the remaining jurors), cert. denied, 450 U.S. 1035, 68 L. Ed. 2d 231, 101 S. Ct. 1749 (1981); Marino v. Vasquez, 812 F.2d 499, 505 (9th Cir. 1987) (juror consulted a dictionary to define "malice"); and Bayramoglu v. Estelle, 806 F.2d 880 (9th Cir. 1986) (juror called a law librarian during deliberations to inquire about the differences, including penalties, between first and second-degree murder).

25. The Court previously notified the parties of the jury

IX. CONCLUSION

For the reasons discussed above, the court DENIES Bloom's second amended petition for writ of habeas corpus.

This opinion and order constitutes a final disposition of this petition by the court. Consistent with the opinion and order, the court vacates the stay of execution previously granted. If Bloom applies for a certificate of probable cause and the certificate is granted, the court will order another stay of execution which will remain in effect until the Court of Appeals acts upon the appeal or the order to stay the execution. See Local Rule 26.8.7(f).

IT IS SO ORDERED.

Dated: December 7, 1993

J. Spencer Letts

United States District Judge

---

misconduct decision in a lengthier analysis of the issue. See Order dated February 22, 1993. The Court stayed that order pending final resolution of the entire petition. That stay order is now vacated.

APPENDIX C

FILED

JAN 31, 1995

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

DEATH PENALTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT MAURICE BLOOM,	) Case No.
	) CV 90-2581-JSL
Petitioner,	) DEATH PENALTY
	) CASE
v.	)
	) ORDER AND OPINION
ARTHUR CALDERON, Warden,	) DENYING
ATTORNEY GENERAL OF THE	) PETITIONER'S THIRD
STATE OF CALIFORNIA	) AMENDED PETITION
	) FOR WRIT OF
Respondent.	) HABEAS CORPUS
	)

BACKGROUND

On December 8, 1993, the court filed an Order and Opinion denying Bloom's second amended petition for writ of habeas corpus. On December 22, 1993, Bloom filed a "Motion to Amend the Petition for Writ of Habeas Corpus, Amend the Findings and Judgment and For a New Trial Pursuant to Federal Rules of Civil Procedure 15, 52, and 59." In that motion, Bloom moved to amend the petition to add two new claims -- trial counsel's conflict of interest and incompetency to stand trial. Petitioner also asked the court to reconsider the original claims in light of his new allegations.

On February 11, 1994, the Court granted Bloom's motion to amend, and Bloom filed his third amended petition. On April 27, 1994, the Court granted in part respondent's motion to reconsider the motion to amend. Because Bloom did not raise his new incompetency claim until after the court denied his original petition, the court treated the new claim as a successive petition and found it procedurally barred. The court did, however, permit Bloom to add his conflict of interest claim, because Bloom initially brought that claim to the court's attention during the pendency of the first petition.

After allowing briefing and discovery, the Court held an evidentiary hearing on the conflict of interest claim on October 6, 1994. For the reasons discussed below, the court finds that Bloom's trial counsel did not suffer from a conflict of interest that violated Bloom's Sixth Amendment right to counsel.

DISCUSSION

INCOMPETENCY TO STAND TRIAL

For completeness of the record and with the hope of facilitating a single, timely appellate review, the court also considers and denies Bloom's incompetency claim on the merits without intending to reverse or abandon its prior ruling that the claim is barred as a successive petition. The record as to the incompetency claim is complete, and the claim is without merit. The court incorporates by reference the discussion of competency contained in the December 8, 1993 Order and Opinion. The court is not persuaded that views as to Bloom's pre-trial and trial competency expressed in declarations made in 1993 and 1994 are more probative as to the truth of Bloom's mental state than are the

contemporaneous views of those who actually observed Bloom during the relevant time.

In addition, the court is persuaded by the fact that at the first evidentiary hearing in this case, the court's psychiatric expert, Dr. Mills, testified that at a joint meeting the four psychiatrists in this case agreed without dissent that Bloom was competent to stand trial. [HT 3/657-658][1] All three of the other psychiatrists testified at the hearing, and Dr. mills testimony regarding Bloom's competency to stand trial was not disputed. In light of this, the court believes that Bloom's competency does not merit yet another review.

CONFLICT OF INTEREST

Bloom alleges that during the same time that his trial attorney, Sherwin Edelberg, was representing him, Edelberg's law partner, James Blatt, was representing Rodney Catsiff, a jailhouse informant who testified against Bloom at Bloom's preliminary hearing. According to Bloom, this simultaneous representation created a conflict of interest which violated his Sixth Amendment right to counsel.

While Bloom's allegations appeared initially to pose serious questions, on the basis of the evidence actually presented, the court finds that there was no conflict which would justify relief. The parties generally agreed on the relevant facts; they differed mainly in the interpretation and significance of the facts.[2]

---

1. HT refers to the transcripts of the first evidentiary hearing. HT2, used elsewhere in this Order, refers to the transcripts of the second evidentiary hearing. A number standing alone refers to the exhibit number at the second evidentiary hearing.

2. The court has appended to this Order a summary of the undisputed facts presented at the hearing, which may be deemed relevant to further proceedings.

The disputed facts in this case involve three questions:

(1) Was Catsiff's testimony in the Bloom case the reason why Catsiff was rewarded with the no time/no fine sentence?

(2) Did Blatt have himself relieved from Catsiff's felon with a gun case because he learned of Catsiff's role in the Bloom case?

(3) Did Blatt play any role in securing the no time/no fine deal for Catsiff in March 1983?

Having considered all of the exhibits in this case and having weighed the testimony and credibility of the witnesses at the evidentiary hearing, the court resolves the disputed questions as follows:

(1) Notwithstanding Catsiff's apparent involvement as an informant in other murders, including at least one other triple murder, the weight of the evidence supports a finding that Catsiff was allowed to plead to a misdemeanor and receive a no time/no fine sentence in March 1983, at least in part, because of his testimony at Bloom's preliminary hearing. The evidence established that Detective Welch was involved in arranging the plea for Catsiff. There is no evidence before the court that Catsiff and Welch worked together on any other murder cases. The court's conclusion, therefore, is that Catsiff received a benefit -- the no time/no fine resolution of his felon with a gun case -- at least in part, based on his informant assistance at Bloom's preliminary hearing.

(2) The court finds it more probable than not that Blatt did declare a conflict in Catsiff's felon with a gun case because he learned of Catsiff's testimony in Bloom's case. The court reaches this conclusion despite its belief that Blatt was an honest witness who was being as candid and truthful as he could. Although Blatt appeared to be firmly convinced that he never learned of Catsiff's informant activities in the Bloom case, Blatt was unable to give any other reasonable explanation for the

file notation that he declared a conflict in Catsiff's case. [HT2/47-50]

The court gives considerable weight, however, to Blatt's testimony that he believes he declared a conflict for reasons unrelated to the Bloom case because if the conflict had involved Bloom, he would have noted it in Catsiff's file and notified Edelberg immediately when he learned of it. [HT2/58-62] The court does not doubt the truthfulness of that testimony.[3/] Blatt's failure to make a notation and contact Edelberg can be reconciled with a finding that he declared a conflict because he learned of Catsiff's testimony in the Bloom case. The evidence presented to the court is consistent with a finding that sometime after Blatt began representing Catsiff in his felon with a gun case, Blatt became aware that Catsiff had testified against Bloom. At that point, Blatt had performed only ministerial acts for Catsiff and did not believe that an actual conflict existed. Nevertheless, Blatt declared a conflict so that he did not represent Catsiff at the time of Catsiff's plea and sentencing. Under these circumstances, Blatt may not have made file notations or talked to Edelberg because he knew there was no substantive conflict, and any technical conflict would end when he ceased to be Catsiff's attorney. This explanation not only fits the evidence, but it also accounts for Blatt's ability to represent Catsiff again in 1984 without any conflict problems.

(3) The court finds no credible evidence supporting Bloom's contention that Blatt was involved in securing the no time/no fine deal which Catsiff was able to secure in his felon with a gun case. The only evidence offered in support of this contention was that of Catsiff

---

3. The court is virtually certain that given the lapse of almost 12 years since the events at issue took place, none of the witnesses can recall the actual truth. Of the relevant witnesses, Blatt's memory of the events appeared to be the most reliable.

who purported to remember that Blatt had been involved in negotiations over the plea. Catsiff's testimony, as understood by the court, was inconsistent and confusing in many of the details. The court concludes that while Catsiff's testimony was probably honestly intended, the line between his memory and his imagination, if indeed it ever was very clear, has become increasingly blurred over time. As a result, the court gave little or no weight to Catsiff's testimony.

Detective Welch who was instrumental in arranging Catsiff's deal has declared that he had no contact with Blatt relative to that deal. [308] There was no evidence presented that the Los Angeles District Attorney's Office worked with Blatt in arranging the deal. The parties stipulated that deputy district attorney Ralph Peretz would testify that his practice was to work directly with an attorney, not a defendant, in arranging a plea negotiation. [HT2 152-153] No doubt this is true. It does not suggest to the court, however, that in the circumstances of this case, involving a knowledgeable defendant with a long history of informing and clearly able to negotiate for himself, that Peretz, or any other member of the district attorney's office, actually negotiated with Blatt. At the time of the actual plea, of course, Catsiff was representing himself.

In sum, because of the passage of time, it is impossible for the court to accept as fact the version of the relevant events precisely as related by any witness. To determine a version which is more probable than not, therefore, it is necessary to develop a composite version which reconciles all of the evidence as closely finds it to be more probable than not that sometime in March 1983, Blatt learned that his client, Catsiff, had testified against Edelberg's client, Bloom. Blatt then had a discussion with the prosecution in which he learned that Catsiff's pending case would be resolved through a plea bargain. At that point, having done only purely ministerial acts on Catsiff's

behalf, Blatt declared a conflict and had himself relieved from Catsiff's case. Blatt never notified Edelberg of the conflict. Blatt knew that Edelberg represented Bloom, but except for one brief discussion about a routine discovery motion, Blatt had no involvement about a routine discovery motion, Blatt had no involvement in Bloom's representation. Until Edelberg was contacted by Bloom's current counsel, he never learned of Blatt's representation of Catsiff.

Under the circumstances of this case, where Bloom did not raise the conflict of interest claim during the pendency of his trial, his Sixth Amendment claim is governed by Cuyler v. Sullivan, 446 U.S. 335, 348 (1980): "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." An "actual conflict" and an "adverse effect" are separate prongs of the same test. Maiden v. Bunnell, 35 F.3d 477, 480 (9th Cir. 1994). Both pongs must be satisfied for prejudice to be presumed. Id.

An actual conflict of interest occurs when an attorney actively represents conflicting interests. Id. Neither the possibility of a conflict (see Cuyler, 446 U.S. at 350), nor the mere appearance of impropriety (see Nave v. Delo, 22 F.3d 802, 811 (8th Cir. 1994)) is sufficient to establish a Sixth Amendment violation.

Once a petitioner establishes an actual conflict, he must also demonstrate that the conflict adversely affected his attorney's performance. Cuyler, 446 U.S. at 346. A showing of adverse effect is required because an attorney may labor under a conflict of interest but nevertheless provide outstanding representation. Frazer v. U.S., 18 F.3d 778, 787 (9th Cir. 1994) (Beezer, J., concurring). Satisfying the adverse effect prong is a substantial hurdle. Maiden, 35 F.3d at 481. A petitioner must show that the conflict likely had some effect on

counsel's handling of particular aspects of the trial. See U.S. v. Miskinis, 966 F.2d 1263, 1264 (9th Cir. 1992).

Bloom has not demonstrated that Edelberg suffered from an actual conflict of interest or that Edelberg was adversely affected by any conflict of interest. Edelberg's lack of knowledge that Blatt ever represented Catsiff forecloses any finding of a conflict.[4] At no time did Bloom's interests and Edelberg's interests diverge as a result of Blatt's representation of Catsiff. Moreover, Edelberg's representation of Bloom could not have been adversely affected by Blatt's representation of Catsiff when Edelberg never knew about the representation. Bloom's unsubstantiated speculations do not demonstrate any adverse effect.

The mere possibility of a conflict is not sufficient to warrant habeas relief. Cuyler, 446 U.S. at 350. In this case, the simultaneous representation created no conflict of interest and caused no adverse effect.[5]

---

4. Bloom attempts to circumvent this hurdle by arguing that under California law every confidence possessed by one attorney in a firm is deemed to be held by all lawyers in a firm. While petitioner's statement of California law is correct, his application is misplaced. The presumption of imputed knowledge is based on prophylactic ethical considerations, not on constitutional concerns. See e.g. U.S. Gallegos, 39 F.3d 276, 279 (10th Cir. 1994) (a violation of a professional rule of conduct is not itself a constitutional violation under Cuyler).

State rules governing attorney conduct do not have constitutional origin. Professional rules of ethics necessarily vary with time, locale and circumstances. The increase of lawyer mobility, for example, has necessitated changes in ethical rules to avoid the possibility that conflicts would cause attorney gridlock and deprive clients of attorney choice. Thus, while the circumstances of this case may have, under state law, required Edelberg to be relieved of counsel back in 1982, those same ethical concerns do not give rise to belief under 28 U.S.C. § 2254 in 1995.

5. While Edelberg, Blatt, and Marcus were, for a short time, law partners in a technical, legal sense, the testimony of the three

CONCLUSION

Bloom's claim of incompetency to stand trial is barred as a successive petition. Even if the Court could entertain the claim, it would find the claim to be without merit.

Bloom's claim that a conflict of interest violated his Sixth Amendment right to counsel is also without merit.

For the reasons, the court DENIES Bloom's third amended petition for writ of habeas corpus.

This Order and Opinion concludes the proceedings in this court. There is currently no stay of execution in place. If Bloom applies for a certificate of probable cause and the certificate is granted, the court will order another stay of execution which will remain in effect until the Court of Appeals acts upon the appeal or the order to stay the execution. See Local Rule 26.8.7(f).

IT IS SO ORDERED.

Dated: January 31, 1995

J. Spencer Letts
United States District Judge

---

attorneys made clear that the partnership was in actuality more like three separate law practices operating out of the same office space.

APPENDIX D

FILED
FEBRUARY 25, 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT MAURICE BLOOM,	)	No. 95-99005
	)	
Defendant-Appellant,	)	D.C. No.
	)	CV 90-02581-JSL
v.	)	
	)	
ARTHUR CALDERON, Warden,	)	ORDER
	)	
Respondent-Appellee.	)	
	)	

Before: THOMPSON, Circuit Judge.

The appellee Calderon's second motion for stay of mandate is granted. Issuance of the mandate is stayed through and including March 23, 1998, and if a petition for certiorari is filed before then, the stay will continue until final disposition by the Supreme Court. Fed. R. App. P. 41(b).

FILED
JANUARY 22, 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT MAURICE BLOOM,	)	No. 95-99005
	)	
Defendant-Appellant,	)	D.C. No.
	)	CV 90-02581-JSL
v.	)	
	)	
ARTHUR CALDERON, Warden,	)	ORDER
	)	
Respondent-Appellee.	)	
	)	

Before: REINHARDT, THOMPSON and HAWKINS, Circuit Judges.

The respondent-appellee's motion for a stay of the mandate is granted. Issuance of the mandate is stayed for a period of thirty days from the date of the filing of this order, or upon the sooner notification by the Clerk of the Supreme Court that a petition for certiorari has been filed.

ORIGINAL

Supreme Court, U.S.
FILED
APR 23 1998
CLERK

No. 97-1569

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1997

RECEIVED
APR 27 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ARTHUR CALDERON, Warden, Petitioner

v.

ROBERT MAURICE BLOOM, Respondent

CAPITAL CASE

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

DENNIS P. RIORDAN, ESQ.*
DYLAN L. SCHAFFER, ESQ.
RIORDAN & ROSENTHAL
523 Octavia Street
San Francisco, California 94102
Telephone: (415) 431-3472

Attorneys for Respondent ROBERT MAURICE BLOOM

IN FORMA PAUPERIS

*** Counsel of Record**

21 pp

ORIGINAL

TABLE OF CONTENTS

INTRODUCTION 2

FACTUAL SUMMARY 2

REASONS FOR DENYING THE WRIT 9

I. CALIFORNIA HAS WAIVED ITS RIGHT TO RAISE THE TEAGUE ARGUMENT IN THIS COURT AND HAS NOT PRESENTED ADEQUATE GROUNDS FOR REVIEW 10

II. THE COURT SHOULD REJECT CALIFORNIA'S REQUEST TO "SETTLE" AN ALREADY WELL-SETTLED AREA OF LAW . . . 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Bloom v. Calderon,
132 F.3d 1267 (9th Cir. 1997) passim

Bloom v. Vasquez,
840 F. Supp. 1362 (C.D.Cal. 1993) 12

Calderon v. Kelly,
127 F.3d 782 (9th Cir. 1998) 10

Card v. Dugger,
911 F.2d 1494 (11th Cir 1990) 8, 12

Hendricks v. Calderon,
70 F.3d 1032 (9th Cir. 1995) 12

Penry v. Lynbaugh,
492 U.S. 302 (1989) 9, 11

Sanders v. Ratelle,
21 F.3d 1446 (9th Cir. 1994) 8

Strickland v. Washington,
466 U.S. 668 (1984) 2, 14

Sullivan v Louisiana,
508 U.S. 275 (1993) 2

Teague v. Lane,
489 U.S. 288 (1989) 10

United States v. Clack,
957 F.2d 659 (9th Cir. 1992) 11

United States v. Johnson,
268 U.S. 220 (1925) 2

MISCELLANEOUS

Federal Appellate Practice Guide,
Ninth Circuit, § 10.11-10.12 11

INTRODUCTION

The State of California seeks certiorari on two issues not discussed in the Court of Appeals opinion below. The Circuit panel did not address these claims because the state had not raised them in the district court; for the same reason, the state is procedurally barred from pursuing the claims in this Court. Sullivan v Louisiana, 508 U.S. 275,278 (1993)(Court does not consider issue not properly preserved in lower court). The opinion now being challenged can hardly have created a conflict between the circuits on legal questions it did not decide nor even mention.

The Circuit opinion broke no new ground, but simply applied the long-established standard governing ineffective assistance of counsel claims to the facts as the appellate panel found them. Strickland v. Washington, 466 U.S. 668 (1984). The state's real quibble is with those factual findings, which are amply supported by the evidence. In any case, a party's discontent with the resolution of factual issues by a lower court does not constitute an adequate basis for a grant of certiorari. United States v. Johnson, 268 U.S. 220,227 (1925)("We do not grant a certiorari to review evidence and discuss specific facts.")

FACTUAL SUMMARY

On April 22, 1982, Robert Bloom, Jr. ("respondent"), a small, undernourished eighteen year old with no prior history of causing injury to others, shot and killed his father ("Bloom Sr.") on Bloom Sr.'s front porch, in the full view of neighbors.

Bloom v. Calderon, 132 F.3d 1267, 1269 (9th Cir. 1997). To anyone familiar with the details of Robert's life, that event would not have come as a surprise. Bloom Sr. was a professional con man with an extensive criminal history who alternately had used his child as a lure in his schemes to defraud women and had heaped beatings and psychological abuse on Robert, once deliberately breaking his son's arm in a fit of rage. Id. at 1273-74.

Robert had been abandoned to the care of his depraved father at the age of six by his mentally unstable mother, who herself gained a criminal record for crimes of violence. She reentered her son's life periodically thereafter in an attempt to exert an emotionally unbalanced control over him, on one occasion by placing a shotgun to his head. Id.

In the months before he killed his father, Robert, who suffers from substantial right hemispheric brain damage, was deteriorating psychologically. Id. at 1276. In November of 1981, he was arrested for a bizarre incident in which he pulled out a pellet gun at a church meeting. He was thereafter diagnosed by a court-appointed psychiatrist as suffering from a mental illness which rendered him prone to psychotic episodes and posing an extreme danger to himself and others. Id. at 1274. The psychiatrist's recommendation that he be placed in psychiatric therapy at a locked facility was tragically ignored, and Robert was released on probation. Id. Disaster soon followed.

What makes this case truly heartbreaking is that when he

exploded respondent did not simply kill his life-long tormentor; within five minutes of shooting his father, he had slain his stepmother and nine year old stepsister, with whom he had close and affectionate relationships. It was these deaths that made the leveling of capital charges legally possible.

Had the adversarial system properly functioned in this case, the defendant's jury would have confronted complex and subtle issues of fact and law. In the guilt phase, those included whether the elements of premeditation and deliberation or malice aforethought could be found in a mind twisted by a lifetime of physical and psychological abuse, serious illness, and brain damage, particularly in the light of the preexisting psychiatric diagnosis that had predicted Robert's paroxysm of violence.

If, after the jury had considered all the relevant evidence on this issue, it were to reach a penalty phase, it would have faced the wrenching question of whether society should teach its citizens not to kill children by killing one who, at the time of these offenses, was little more than a child himself, and whose cognitive and emotional capacities had been destroyed by those very persons whose duty it was to nurture them. Even the prosecution did not feel that this case demanded the death penalty, for it had offered a sentence of life without parole in pretrial negotiations.

As the Ninth Circuit has now held, a trial worthy of the issues in this case has yet to occur. Id. at 1278. Respondent did not receive the effective assistance of counsel to which he

was entitled, because the psychiatric defense presented on his behalf by his appointed counsel, Sherwin Edelberg, was a shambles. Although he obtained court approval for an examination of Robert by a psychiatric expert soon after entering the case, Edelberg failed to have the examination done for a year, while lying to the state trial court that the process was underway. Id. at 1271.

While Edelberg would later state he delayed the examination in the hope of obtaining some evidence of "irrationality" on Robert's part, he was so inattentive to the case that he remained unaware his client had attempted suicide in the Los Angeles County Jail and was diagnosed by the staff there as suffering transitory psychotic episodes, including auditory and visual hallucinations. Id. at 1274. Nor during this year did Edelberg investigate his client's psychological or family history or obtain the cornucopia of evidence of abuse, brain damage, and mental illness such an investigation would have unearthed. Id. at 1273-77.

On the eve of trial, Edelberg asked a law student working in his office to obtain the report of his psychiatric expert, Dr. Arthur Kling, to whom the lawyer had never spoken. Id. at 1271-72. When Edelberg's clerk discovered the expert had never been notified of his appointment, much less given instructions on conducting an examination, Edelberg directed the student to prepare materials and instructions for the examining psychiatrist, who had little forensic experience. Id. at 1272.

The student's instructions asked Kling to consider mental state defenses of "diminished capacity" that had been abolished in California, rather than the ones which logically would be offered in this case. Id. Kling, for his part, had asked the lawyer to provide "all relevant data, psychiatric and social" and "any additional information that might be available from the social history, family history, medical history." Id.

That information was not forthcoming.[1] Lacking the most critical data relating to respondent's background and personal history, including the neuropsychiatric testing he had requested, but which Edelberg never ordered,[2] Kling conducted an hour and a half interview and wrote a report that concluded there was no evidence to support the defenses he had been asked to consider. Id. The Ninth Circuit characterized the report Kling issued after his abbreviated meeting with Robert as "devastating" to respondent. Id.

Not surprisingly, the prosecution on cross-examination converted Kling into its own witness simply by introducing into evidence his initial and wholly defective report. Id. at 1272-73.

"Ranting and raving" that he had been poorly served by Edelberg in the guilt phase, as he had, Robert demanded and

---

[1] The Circuit lists the small number of documents provided to Kling in its opinion at page 1272. The Attorney General suggests, without explaining how the limited material provided could have led to a meaningful review by Kling, that Kling got what he needed. (Petition for Certiorari ("Cert. Pet.") at 11).

[2] After trial, such testing revealed Bloom suffers from "striking, consistent, and clear evidence of cognitive and sensori-motor deficits, brain dysfunction and brain damage."

received from the trial court the right to seek his own death from the jury. Representing himself, both he and the prosecutor told the jury that there was no evidence of mitigation in the record. Of course, there would have been an overwhelming amount had Edelberg acted with minimal effectiveness during the guilt phase. On the basis of these palpably misleading arguments, the jury imposed death.

In reversing, the Ninth Circuit held: (a) "Bloom's defense was based upon his contention that he lacked the necessary mental capacity for premeditation." Bloom, 132 F.3d at 1270; (b) that being the case, shortly after his appointment, Edelberg sought a court order for appointment of a psychiatric expert. Id. at 1271; (c) "To support [Bloom's] defense . . . trial counsel [Edelberg] hired Arthur S. Kling., M.D., a psychiatrist." Id.; (d) Kling sought a wide variety of relevant background materials from Bloom's lawyer. Id. at 1272; (e) until the eve of trial, counsel did nothing to communicate with or prepare the expert for trial. Id.; (f) having reviewed a limited number of materials provided by Edelberg, and having interviewed Bloom for an hour and a half, Dr. Kling prepared a report which totally undermined Bloom's defense. Id. at 1273; (g) the state made excellent use of the report at trial, turning Dr. Kling into a witness for the prosecution. Id.; (h) with a minimal effort, Edelberg could have unearthed and provided to Dr. Kling a mountain of relevant social and mental health data. Id. at 1273. Such data included a psychiatric evaluation filed just months before the murders

opining that Bloom should be committed and evidence that during his incarceration respondent attempted to commit suicide and suffered from visual and auditory hallucinations. Id. at 1273-77.

The Ninth Circuit reached the following conclusion:

> The complete lack of effort by Bloom's trial counsel to obtain a psychiatric expert until days before trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance. Counsel left the responsibility of obtaining and preparing this key witness to a third-year law student who, due to counsel's lack of diligence, had no idea what defense theory counsel intended to pursue. Because counsel did not acquire the services of this key witness until days before trial, a hurried and inaccurate report resulted. Presenting the witness at trial was a disaster. "Describing [counsel's] conduct as 'strategic' strips that term of all substance." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

Bloom, 132 F.3d at 1277.

After finding that Dr. Kling had requested the material Edelberg could have, but did not, provide, the Court continued:

> We recognize that counsel should not be faulted for failing "'to track down every record that might possibly relate to [the defendant's] mental health'" Hendricks, 70 F.3d at 1038 (quoting Card v. Dugger, 911 F.2d 1494, 1512 (11th Cir 1990)). However, when the defense's only expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert's flawed testimony at trial, counsel's performance is deficient.

Bloom, 132 F.3d at 1278

REASONS FOR DENYING THE WRIT

When this Court ruled capital punishment constitutionally

permissible two decades ago it conditioned that ruling on the existence of a sophisticated process of adjudication ensuring that the ultimate penalty is imposed only after a careful consideration of the facts of the crime and the character of the defendant.[3] This case involves a sentence of execution arrived at by mess and muddle.[4] Implicit in the Ninth Circuit's opinion is the view that respondent, and society itself, are legally entitled to more. That decision is sound. Certiorari should be rejected.

I. CALIFORNIA HAS WAIVED ITS RIGHT TO RAISE THE TEAGUE ARGUMENT IN THIS COURT AND HAS NOT PRESENTED ADEQUATE GROUNDS FOR REVIEW

The Attorney General of California has frequently benefited from rules barring claims on procedural grounds. See e.g.,

---

[3] "In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' Woodson, 428 U.S., at 305, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." Penry v. Lynbaugh, 492 U.S. 302, 306 (1989).

[4] Counsel's performance not only was deficient, it was conflicted. When the Superior Court of Los Angeles appointed counsel to represent Bloom, it named Sherwin Edelberg, a member of the law firm -- Blatt, Edelberg & Marcus -- representing a jailhouse informant, Rodney Catsiff, who had been a principal witness against respondent at his preliminary hearing. The firm continued to represent both clients simultaneously for several months, during which time a deal was reached to provide benefits to Catsiff for his trial testimony against Bloom. The firm continued on respondent's case without ever informing him or the trial judge of the conflict.

The Ninth Circuit declined to reach the "conflict" issue, having ordered the District Court to grant Bloom's habeas petition as a result of his counsel's inadequate performance. 132 F.3d at 1278.

Calderon v. Kelly, 127 F.3d 782 (9th Cir. 1998)(state successfully sought writ of mandamus to compel district court to dismiss habeas corpus action as a result of Kelly's failure to file within time limits set by Antiterrorism and Effective Death Penalty Act, despite overwhelming evidence of his mental incapacity).

In the district court, the state raised many claims of procedural defaults. See e.g., Memorandum in Support of Answer to Second Amended Writ ("Memorandum I") at 50, 58 (argument relating to jury instruction at penalty hearing barred by Teague);[5] Memorandum I at 52 (instructional issue not exhausted); Supplemental Memorandum of Points and Authorities in Support of Answer ("Supplemental Memorandum") at 10 (jury misconduct claim barred by Teague); Memorandum in Support of Motion to Reconsider Petitioner's Motion to Amend ("Reconsideration") at 4 (competence claim untimely); Reconsideration at 9 (competence claim amounts to an abuse of the writ); Reconsideration at 14 (conflict claim amounts to an abuse of the writ); California's Brief on Appeal ("CBA") at 20, 36 (Bloom failed to exhaust his conflict claim); CBA at 31, 36-37 (conflict claim barred by Teague); CBA at 36 (conflict claim never raised and therefore waived).

The state now asks this Court to enter into a Teague review of one of the few issues as to which it raised no claim of procedural default in the District Court, i.e., whether respondent was deprived of his right to counsel as a product of

---

[5] Teague v. Lane, 489 U.S. 288 (1989).

his lawyer's complete failure to prepare a solitary expert witness. Because the state did not raise the issue at the appropriate time, Bloom had no opportunity to brief the issue in the District Court and, not surprisingly, in rejecting Bloom's ineffectiveness claim, the district court did not cite or rely on Teague. See Petition for Certiorari, Appendix B at 8-24.

In its Ninth Circuit brief, the Attorney General argued at length, as it had in the District Court, that respondent's conflict claim (CAB at 31, 37-38) and argument under Penry v. Lynaugh, 492 U.S. 302 (1989)(CAB at 76-77) were Teague-barred. Also, in a footnote, for the first time since the habeas petition was filed in federal court in 1990, the Attorney General extended its Teague argument to Bloom's incompetence claim. See CAB at 55 n.37.

The Ninth Circuit did not address this Teague argument, no doubt because the claim had never been presented to the District Court. See e.g. United States v. Clack, 957 F.2d 659 (9th Cir. 1992)(no review of claims raised for the first time on appeal); Federal Appellate Practice Guide, Ninth Circuit, § 10.11-10.12, citing cases.[6]

---

[6] The Attorney General accuses the Ninth Circuit of "flout[ing] this Court's repeated procedural admonition that the lower federal courts first 'must' resolve the issue of the State's 'threshold' Teague defense before considering the merits of constitutional claims in habeas corpus cases." Cert. Pet. at 8. Given the state's failure to raise the Teague issue until its responsive brief in the Court of Appeal, years after Bloom's incompetence claim was submitted to the District Court, the Ninth Circuit might well have accused California itself of doing some "flouting." Rather, the Court of Appeal simply, and properly, ignored the claim.

Furthermore, the Teague claim presented here is not the one presented to the Ninth Circuit. There, California's Teague claim rested on Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995). Hendricks faulted his lawyer for failing to conduct an investigation of his "social history evidence relevant to . . . mental condition where there [is] an indication of mental disturbance and to provide such evidence to an expert in order for [his] condition to be properly evaluated." Id. at 1038.

The Ninth Circuit rejected Hendricks "investigation" claim, holding the lawyer had no affirmative duty to investigate: "In the absence of a specific request, an attorney is not responsible for gathering background material that might be helpful to a psychiatrist evaluating his client." CAB at 55-56, quoting Hendricks, 70 F.3d at 1038, quoting Bloom v. Vasquez, 840 F.Supp. 1362, 1370 (C.D.Cal. 1993)(emphasis added).

The District Court in Bloom had held that Dr. Kling had never asked Edelberg for extensive background materials on respondent's social and mental health history. 132 F.3d at 1277. The Attorney General's new Teague argument in the Ninth Circuit simply followed from that factual finding: for Bloom to prevail, the court would have to expand the duty discussed in Hendricks -- i.e., to investigate social history and provide that information to a mental health expert where there has been a request from the expert for the materials -- and such an expansion would amount to a new rule. See CAB at 55 n.37.

But the Ninth Circuit rejected the factual predicate upon

which the district court's ruling had turned, calling it "clearly erroneous." 132 F.2d at 1277. The Court of Appeal found Dr. Kling had made the request for social and mental health materials that was missing in Hendricks. Id. at 1277-78. The state did not challenge that ruling on rehearing or hearing en banc below, and does not dispute it here. Given the Circuit's factual finding, Bloom is entitled to relief under law embraced by the state which cannot possibly be characterized as "new."

Having lost its former Teague argument with the rejection of the District Court's key factual finding, the state is forced to alter its procedural claim here. Now, in an argument that is as confusing as it is procedurally barred, the state argues Bloom imposes a new duty upon defense counsel "to gather or choose material for a defense expert to consider in rendering his opinion" (Cert. Pet. at 10). The arguments contained in California's petition have never been raised before; no Teague claim at all was raised in the District Court. This Court should deny certiorari.

II. FOR PROCEDURAL AND SUBSTANTIVE REASONS, THE COURT SHOULD REJECT CALIFORNIA'S REQUEST TO "SETTLE" AN ALREADY WELL-SETTLED AREA OF LAW

At its core, this is not a particularly complicated case. Respondent's trial counsel pursued a mental state defense, hired an expert, but failed to prepare the expert for trial. That lack of groundwork led to a disastrous trial performance by the expert: "his testimony not only failed to help the defense, it significantly hindered it." 132 F.3d at 1278. The Court of

Appeals concluded that "had it not been for the deficient performance of Bloom's trial counsel, there is a 'reasonable probability' that the verdicts 'would have been different.'" Id., quoting Strickland, 466 U.S. at 694.

Fearing rejection of its new and substantiveless Teague claim on the first Strickland prong, the state now fashions out of whole cloth a "question" for review by this Court relating to the second Strickland prong. It asks this Court to hold that Strickland requires both a "showing of probable effect on the actual outcome of the trial [and] a determination that counsel's deficient performance rendered the trial fundamentally unfair or unreliable." Cert. Pet. at i.

Three responses are in order. First, California's second question falls within none of the appropriate grounds for certiorari contained in this Court's rules. Supreme Court Rule 10.

Second, its suggestion to the contrary notwithstanding (see Cert. Pet. at 16), California raised the Fretwell issue for the first time in the Ninth Circuit. The issue as presented here was not raised in the state's briefs in the District Court, nor was it addressed in the District Court's opinion.

Third, the state all but concedes there is no issue to be "settled" by this Court. It states, rather, that "certain aspects of [Lockhart v.] Fretwell[, 506 U.S. 364, 369 n.2 (1993)] lend themselves to arguments that the [Strickland] rule might still remain unsettled. Cert. Pet. at 14 (emphasis added). It

calls the rule "arguably ambiguous." Cert. Pet. at 15. Since the state itself cannot articulate a clear conflict in the law, the Court should expend its time on more pressing matters.

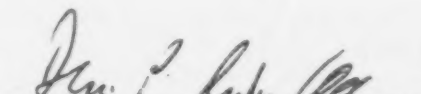
CONCLUSION

For the reasons stated, California's petition for a writ of certiorari should be denied.

Dated: April 23, 1998

Respectfully submitted,

RIORDAN & ROSENTHAL



BY: DENNIS P. RIORDAN

Attorneys for Respondent
ROBERT MAURICE BLOOM

97-1569

CERTIFICATE OF MAILING

Supreme Court Rules 29.2, 29.5(b)

I, Dennis P. Riordan, am a member of the Bar of the United States Supreme Court and represent Robert Maurice Bloom. To my knowledge, on April 23, 1998, Bloom's OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI to the Ninth Circuit Court of Appeals and Bloom's MOTION TO PROCEED IN FORMA PAUPERIS were deposited in the United States Post Office at Gough and Hayes Streets in San Francisco and was addressed to the Clerk of the United States Supreme Court and to the following parties with first class postage:

Robert C. Schneider, Esq.
Deputy Attorney General
300 South Spring Street, Room 5000N
Los Angeles, CA 90013

Robert Bloom
No. C-90300
Box C-90300
Tamal, CA 94974

As a result of this mailing all parties required to be served have been served.

Dated: April 23, 1998

Dennis P. Riordan, Esq.

DENNIS P. RIORDAN
HAROLD J. ROSENTHAL
DYLAN L. SCHAFFER
MARC J. ZILVERSMIT
DONALD M. HORGAN

RIORDAN & ROSENTHAL
ATTORNEYS AT LAW
523 OCTAVIA STREET
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 431-3472
FAX (415) 552-2703

SHERRY ALHAWWASH
LEGAL SECRETARY

RECEIVED
APR 27 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

April 23, 1998

CLERK OF THE COURT
U.S. Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Re: **Calderon v. Bloom, No. 97-1569**

Dear Clerk:

__X__ Please file enclosures.

__X__ Return Endorsed filed copies to us.

_____ Present order to Judge _____
and return file-stamped copies to us.

_____ Record and return to us.

_____ Certify _____ copies and return to us.

_____ Check enclosed in the sum of $_____.

__X__ Stamped, self-addressed envelope enclosed.

Thank you.

RIORDAN & ROSENTHAL

By: Sherry Alhawwash
SHERRY ALHAWWASH

Enclosures

97-1569

CERTIFICATE OF MAILING

Supreme Court Rules 29.2, 29.5(b)

I, Dennis P. Riordan, am a member of the Bar of the United States Supreme Court and represent Robert Maurice Bloom. To my knowledge, on April 23, 1998, Bloom's OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI to the Ninth Circuit Court of Appeals and Bloom's MOTION TO PROCEED IN FORMA PAUPERIS were deposited in the United States Post Office at Gough and Hayes Streets in San Francisco and was addressed to the Clerk of the United States Supreme Court and to the following parties with first class postage:

Robert C. Schneider, Esq.
Deputy Attorney General
300 South Spring Street, Room 5000N
Los Angeles, CA 90013

Robert Bloom
No. C-90300
Box C-90300
Tamal, CA 94974

As a result of this mailing all parties required to be served have been served.

Dated: April 23, 1998

RECEIVED
APR 27 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Dennis P. Riordan, Esq.

ORIGINAL

No. 97-1569

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

Arthur Calderon, Warden, ***Petitioner,***

v.

Robert Maurice Bloom, ***Respondent.***

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

CERTIFICATE OF SERVICE

I am a member of the Bar of the United States Supreme Court. I certify that, on March 20, 1998, three copies of the accompanying Petition for Writ of Certiorari were mailed by depositing them in a United States mailbox, first-class postage prepaid, addressed to counsel for respondent as follows: Dennis P. Riordan, Esq., Riordan & Rosenthal, 523 Octavia Street, San Francisco, California 94102 [(415) 431-3472]; and that service thus has been accomplished on all parties in compliance with this Court's Rule 29.

Donald E. de Nicola
Deputy Attorney General
300 South Spring Street, Suite 500
Los Angeles, California 90010
(213) 897-2388
Counsel for Petitioner

RECEIVED
MAR 23 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAY 22 1998
OFFICE OF THE CLERK

No. 97-1569

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

ROBERT MAURICE BLOOM, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Deputy Attorney General
ROBERT C. SCHNEIDER
Deputy Attorney General
DONALD E. DE NICOLA *
Deputy Attorney General
* Counsel of Record
300 South Spring Street
Los Angeles, California 90013
Telephone: (213) 897-2388
Counsel for Petitioner

(CAPITAL CASE)

QUESTIONS PRESENTED

1. Whether the existence of a purported Sixth Amendment rule, imposing a duty upon criminal defense counsel to identify and provide a defense expert information the expert might find relevant in rendering a non-legal opinion, was so settled that it became permissible under the *Teague v. Lane* doctrine for the Ninth Circuit to enforce the rule retroactively to grant habeas corpus relief to a state prisoner.

2. Whether the "prejudice" necessary to a Sixth Amendment claim of ineffective counsel under *Strickland v. Washington* requires, beyond a showing of probable effect on the actual outcome of the trial, a determination that counsel's deficient performance rendered the trial fundamentally unfair or unreliable.

IN THE SUPREME COURT OF THE UNITED STATE

OCTOBER TERM, 1997

No. 97-1569

ARTHUR CALDERON, Warden, *Petitioner*,

v.

ROBERT MAURICE BLOOM, *Respondent*.

PETITIONER'S REPLY MEMORANDUM

In his opposition to the certiorari petition, the prisoner Bloom alleges (1) that the State did not raise the *Teague v. Lane* retroactivity issue [Question Presented No. 1] in the district court or the court of appeals and (2) that the State did not raise the *Lockhart v. Fretwell* ineffective-counsel issue [Question Presented No. 2] in the district court. (Opp. 11, 12, 14.) Neither assertion has merit as a ground to deny certiorari.

1. The Teague Question.

The *Teague* issue concerns the retroactivity of a rule purporting to impose upon trial counsel a Sixth Amendment obligation to identify and provide, for a defense mental-state expert, documents the expert might find relevant in arriving at his opinion. Although it is true that the State did not rely upon the *Teague* doctrine in the district court, that omission is of little consequence in light of the fact that the district court in the end rejected petitioner's ineffective-counsel claim on the merits

anyway.[1] (See *Schiro v. Farley*, 510 U.S. 222, 228-9 (1994) (State can raise *Teague* for first time on appeal from judgment in its favor); see also Stern & Gressman, *Supreme Court Practice,* 116-129 (7th ed.) (discussing special federalism obstacles arising from inadequate presentation of certiorari question in state, rather than federal, courts). When petitioner raised the claim on appeal to attack the judgment, the State generally explained the *Teague* doctrine in its brief (Appellee's Br., 37-8); and the State asserted it specifically in a footnote in defense of the district court's judgment on this very point (*id.* at 55 & n. 37). (See Appendix [excerpt of argument from State's appellate brief].) Petitioner had ample opportunity to reply.

Petitioner asserts that the State's *Teague* defense below differs from the *Teague* question it presents now. (Opp. 12.) Although Bloom recited in his appeal that the defense expert in fact had requested information from trial counsel, Bloom's legal argument in his opening brief in the court of appeals more broadly proffered a purported rule that "[w]hen an attorney has chosen to pursue a psychiatric defense, he must properly prepare and present the expert testimony relevant to that defense," including "ensuring that [expert witnesses] possess the background material needed to offer a professionally adequate opinion . . ." (Appellant's Opening Br., 66-71.) The State responded to that claim on the merits, and further asserted in a footnote that petitioner's contention amounted to a plea for a 'new rule' under *Teague*.

---

1. The district court ruled that, "[i]n the absence of a specific request, an attorney is not responsible for gathering background material that might be helpful to a psychiatrist evaluating his client. Accordingly an attorney cannot be held incompetent for failing to gather such documents." (Appendix B, Pet. for Writ of Certiorari, p. 14.)

(Appellee's Br., 55 at n. 37.) Bloom made a broa contention; and the State responded that the contentio was *Teague* barred.

It is hypertechnical for Bloom to say now that th State had limited its *Teague* defense only to a mor specific rule that would have imposed a sixth amendmer obligaton on trial counsel in the absence of a specif request for information by the expert. (Opp. 12 Although the State indeed had characterized petitioner contention as one that would impose a new obligation o counsel even in the absence of a request by the expert fo information, the State should not be required to do mor than respond to the argument that the petitione apparently presented. In any event, the State did more Intertwined with its argument that petitioner's contentio was barred by *Teague,* the State cited *Card v. Dugger,* 91 F.2d 1494 (11th Cir. 1990) -- by way of quoting fro *Hendricks v. Calderon,* 70 F.3d 1032 (9th Cir. 1995) -- a a relevant case that involved, not the absence of a expert's request for information, but the lack of indicatio that the experts had considered themselves otherwis incapable of rendering an opinion. And, more generally the State already had argued that *Teague* required Bloom to show how the legal landscape at the time of finality o his conviction "dictated" the constitutional rule upon whic he was relying in seeking relief. (Appellee's Br. 38.) Th State's *Teague* defense, when asserted at all, was therefor necessarily co-extensive with the actual scope of the "rule actually proferred by Bloom in his own legal contentions That *Teague* defense aligns with the *Teague* questio presented here.

Petitioner speculates that the Ninth Circuit rejecte the State's *Teague* defense on grounds that it had not bee raised in the lower court. But the Ninth Circuit retains a hoc discretion to hear a *Teague* claim for the first tim even in a rehearing petition. See *Boardman v. Estelle,* 95 F.2d 1523, 1536 (9th Cir. 1992). Nothing in the panel

opinion ever stated or implied that the State had waived its *Teague* defense to the claim. (Cf. *Boardman,* at 1536-37.)

2. The Fretwell Question.

The *Fretwell* issue, concerning the standard of prejudice required to make out a violation of the right to effective counsel, indeed was raised by the State in the district court. In an April 1993 memorandum setting out the State's "theory of the case," filed in the district court shortly after *Fretwell* was decided by this Court, the State cited *Fretwell* in support of its specific argument that outcome-determination, as opposed to unfairness or unreliability, was insufficient to show the prejudice prong of the sixth amendment violation.[2/] The district court denied petitioner's ineffective-counsel claim. In responding to petitioner's appeal from the district court judgment, the State again cited *Fretwell* in its appellee's brief and again argued that a showing by petitioner of

---

2. In the district court, the State argued: "Even if the 'different result' element were met, that alone, while necessary, is insufficient to prove prejudice. In *Fretwell,* the court reiterated its earlier holding that the 'defendant could not show Strickland prejudice merely by demonstrating that the outcome would have been different but for counsel's behavior.' . . . 122 L.Ed.2d at p. 120, fn.3. The *Fretwell* court, also relying on *Nix v. Whiteside,* 475 U.S. 157, . . . stated that if petitioner 'was deprived of neither a fair trial nor of any specific constitutional rights to guarantee a fair trial, he has suffered no prejudice,' even if a more favorable result would have occurred . . . . [R]espondent contends that trial counsel's performance satisfied the constitutional obligations of due process and reasonable investigation in that he obtained access to a qualified psychiatrist and he investigated the mental defense to the extent the psychiatrist presented unconditional testimony in support of the defense theory. The defense was legally plausible and responsive to the facts such that it was sufficient to establish a reliable result." (Memorandum of Contentions of Fact, filed 4/27/93, *Bloom v. Vasquez,* CV 90-2581.)

effect on the outcome, rather than unfairness and unreliability, was not enough. (Appellee's Br. 69-71.)[3]

CONCLUSION

For these reasons, and the reasons cited in the State's petition, the State respectfully requests that this Court issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

Dated: May 21, 1998.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Attorney General
ROBERT C. SCHNEIDER
Deputy Attorney General

DONALD E. DE NICOLA *
Deputy Attorney General
* Counsel of Record
Counsel for Petitioner

---

3. A statement on page 6 of the State's petition, however, must be corrected. There the petition asserts that neither the Ninth Circuit's conclusion that the expert indeed had requested information from trial counsel, nor its account of what such information would have comprised, played a role in the holding on appeal. The conclusion about whether there had been a request indeed played a role, albeit an unjustified one, in the appellate court's decision. The court's error with respect to that conclusion is the very basis for the *Teague* issue the State raised in the petition.

APPENDIX

EXCERPT OF ARGUMENT FROM STATE'S APPELLATE BRIEF

D. DUTY TO PREPARE EXPERT WITNESSES

In spite of the conclusions of the forensic experts that Dr. Kling had much more than the normal amount of information provided to a psychiatrist under the circumstances, petitioner contends trial counsel was obligated to take responsibility for knowing exactly what information a psychiatrist needs to come to a valid psychiatric conclusion. (AOB 66). That contention has been resoundingly decided against petitioner.

In the first place, respondent submits that Dr. Kling had a significant and sufficient quantum of information upon which to form his opinion regardless of the materials he did not have. Moreover, what Dr. Kling had was representative of all of the materials he claimed at the evidentiary hearing he would like to have had. It is not ineffective to refrain from obtaining materials that are not essential to the determination of petitioner's state of mind at the time of the crimes. Deep and extensive background materials might be valuable in a therapeutic setting, but the forensic experts below, in addition to Dr. Kling, were unanimous that the essentials in a forensic context are the facts of the case and the subject before them.

Furthermore, Dr. Kling never told Edelberg he had insufficient materials to form a conclusion and make a report. Dr. Kling never asked for additional time to interview petitioner. He never met with petitioner's mother in order to follow up on any of the materials she had provided. (HT-1 426.) Even though Dr. Kling had the description and phone number of the mental health professional who had seen petitioner following petitioner's earlier robbery, Dr. Kling did not call that number and seek further information. (HT-1 427-28.) Dr. Kling did not include in his written reports or trial testimony that his

opinion was conditional nor did he apply any qualifications to his opinion. In fact, Dr. Kling would not have testified to anything he did not believe was medically accurate and defensible. (HT-1 428-29.) Dr. Stalberg testified it was the psychiatrist's obligation to ask for more materials if more were necessary and to included any qualifications of an opinion in his report. (HT-1 574.) That expert forensic conclusion has been accepted as the law in this circuit.

In *Hendricks v. Calderon*, 70 F.3d 1032, a trial attorney provided his experts with "the limited information on Hendricks in his possession, that is, the confession and the police reports." *Id.* at 1037. Even though the "limited information" provided by Hendricks' attorney was substantially less than the "real chunk of information" provided to Dr. Kling, Hendricks' experts, [sic] neither requested "further background information on Hendricks from [his attorney] or qualified their conclusions due to insufficient information on their patient." *Id.* The same can be said of Dr. Kling. On appeal, Hendricks was of the view that his attorney "was dutybound to interview Hendricks' family members and friends, to obtain medical, school, and employment records, to otherwise verify Hendricks' autobiography and pass this information on to his mental health experts." *Id.* at 1038. As here, Hendricks' appellate argument was that his experts' opinions could not be meaningful, "[w]ithout such background material." *Id.* Again, as here, Hendricks argued on appeal that:

> trial counsel had a duty to provide the experts with his client's family social history, even absent any request from the experts. He argues that counsel's failure to do so undermines the expert's conclusions to such any extent that they cannot provide an adequate basis on which the attorney could make strategic choices.

Id.

This Court rejected such a contention and concluded:

> Neither reason nor the existing authority would lead one to conclude that an attorney in 1980 had such an affirmative constitutional duty. [37] Although this Court has not specfically addressed this question, the Eleventh Circuit and the Central District of California have studied the matter. Facing the identical issue this case presents, the Eleventh Circuit concluded that an attorney "was not obligated to track down every record that might possibly relate to [the defendant's] mental health and could affect a diagnosis." *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990). In that case, as here, there was "no indication that the experts felt incapable of basing their conclusions on the information they obtained through their own testing and examination . . ." *Id.* Similarly, the Central District of California has held, "In the absence of a specific request, an attorney is not responsible for gathering background material that might be helpful to a psychiatrist evaluating his client." *Bloom v. Vasquez*, 840 F.Supp. 1362, 1370 (C.D. Cal. 1993).

Id.

As is obvious from the above citation, this Court in *Hendricks* cited the district court opinion in this very case for the proposition that trial attorneys are not responsible for gathering every bit of background material that might be of assistance to a psychiatric expert. In concluding that it was not the trial attorney's responsibility to determine what psychiatrists needed, *Hendricks* went on to say:

---

37. This Court's unambiguous finding that no authority supports petitioner's contention by definition makes that contention the request for a "new rule" and unavailable to him in these collateral proceedings. See *Teague v. Lane*, 489 U.S. at 301.

> To now impose a duty on attorneys to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert, would defeat the whole aim of having experts participate in the investigation. . . . To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert . . . . If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous.

Id. at 1038-39.

After ruling it was not a trial attorney's duty to do the work of psychiatric experts, this Court in *Hendricks* further concluded in the context of a trial attorney's constitutional duty to provide competent counsel:

> To hold otherwise would raise the Sixth Amendment hurdle well above the floor of minimal competence, requiring attorneys to have the specialized knowledge to evaluate an expert's conclusions before relying upon them in making strategic choices. By forcing lawyers to second-guess their experts, the position Hendricks argues would effectively eliminate the legitimate role experts play in guiding and narrowing an attorney's investigation.

Id. at 1039.